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AARP
Real Possibilities

July 15, 2013

Chairman Bob Stump
Commissioner Gary Piece
Commissioner Brenda Burns
Commissioners Susan Bitter Smith
Commissioner Bob Burns
Arizona Corporation Commission
1200 West Washington
Phoenix, AZ 85007-2996

RE: Generic Docket No. E-00000W-13-0135, IN THE MATTER OF THE COMMISSION'S INQUIRY INTO RETAIL ELECTRIC COMPETITION

Dear Commissioners:

Enclosed please find the original and 13 copies of the Comments of AARP in Generic Docket No. E-00000W-13-0135.

Sincerely,

David Mitchell
State Director, AARP Arizona

Arizona Corporation Commission
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BEFORE THE ARIZONA CORPORATION COMMISSION

Generic Docket No. E-00000W-13-0135, IN THE MATTER OF THE COMMISSION'S INQUIRY INTO RETAIL ELECTRIC COMPETITION

COMMENTS BY AARP

July 15, 2013

INTRODUCTION

In its Order seeking Comments on Retail Electric Competition, the Commission has sought responses to a wide range of questions to assist in its "rigorous examination of the complex issues surrounding electric retail competition in order to reach an informed decision."

AARP is a nonpartisan, nonprofit social welfare organization with a membership that helps people 50+ have independence, choice, and control in ways that are beneficial and affordable to them and society as a whole. AARP is an advocate for the rights of people 50 and older. A substantial percentage of AARP's members live on fixed or limited income. A major priority for AARP is to protect consumers from unaffordable expenses for essential energy services that may endanger their health and financial security.

AARP's comments were prepared with the assistance of Barbara R. Alexander, Consumer Affairs Consultant.

Ms. Alexander's expertise in this area is a reflection of over 30 years of professional experience in consumer protection policies and programs, both with respect to consumer credit transactions, public utility regulatory policies, and regulation of retail competitive markets. From 1978-1983 she was the Superintendent of the Maine Bureau of Consumer Credit Protection, responsible for the supervision and enforcement of the Truth in Lending, Debt Collection, and Fair Credit Reporting Acts over Maine licensed financial and commercial lenders. From 1986-1996 she was the Director of the Consumer Assistance Division of the Maine Public Utilities Commission, responsible for handling customer complaints and participating in formal regulatory proceedings on consumer protection policies, customer service, and low income assistance programs applicable to regulated telecommunications, electric, and natural gas utilities. Since 1996, Ms. Alexander has appeared in over 15 state jurisdictions in the U.S. and Canada on consumer protection, customer service, and low income policies and programs related to the development of retail competitive markets. At the onset of the development of the retail energy markets she prepared a guide to the development of

consumer protection programs and policies applicable to retail energy suppliers that was published by the U. S. Department of Energy. Ms. Alexander has represented national consumer organizations, including AARP, and state public advocates in the development of retail market regulations, including licensing, customer disclosures, contract term regulation, and enforcement policies applicable to retail natural gas and electric suppliers. Pertinent to this proceeding, she has appeared as an expert witness on behalf of advocates and regulatory commission staff in the development of default or standard service for residential customers in Maine, Pennsylvania, Maryland, and Ohio.

SUMMARY OF AARP'S COMMENTS AND RECOMMENDATIONS

Electric service is essential to all residential customers and the affordability of this service for low and fixed income customers whose energy burden is high in relationship to their income is crucial. Affordable electricity is essential for lighting, refrigeration, and cooling, a characteristic not shared by most other consumer goods and services, for which substitutes exist. Unaffordable electricity in Arizona's hot climate has dire consequences for residential customer health and safety.[1]

Low income families, and households with medically frail and very old or very young members, are particularly vulnerable to excessive prices. It is well documented that many families face the choice between cooling and eating or purchasing vital medical supplies.[2]

Older Americans who cannot afford basic energy services are particularly vulnerable to health impacts due to insufficient heating or cooling:

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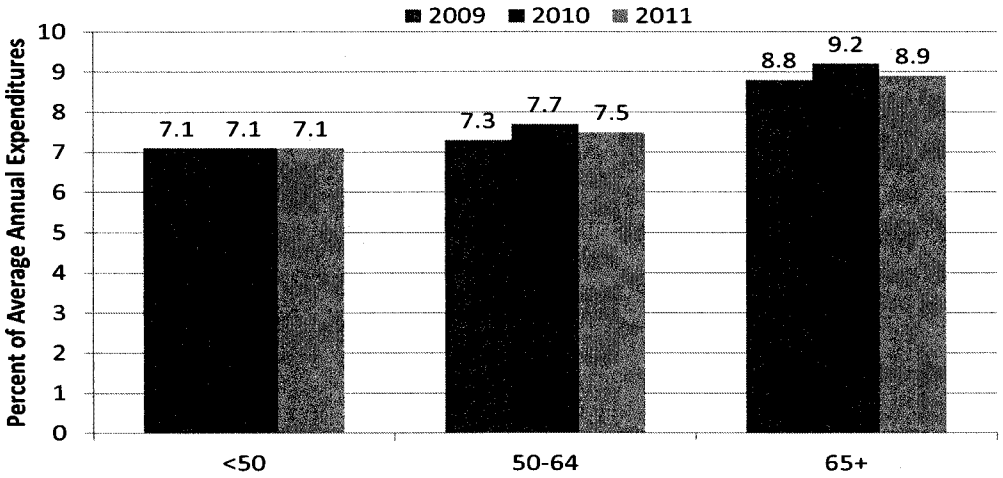
[1] See, e.g., Snyder, Lynne Page, PhD, MPH, National Energy Assistance Directors' Association, Baker, Christopher A. AARP Public Policy Institute, Affordable Home Energy and Health: Making the Connections, AARP (June 2010).

[2] The National Energy Assistance Directors Association conducts periodic surveys of LIHEAP recipients. The most recent survey in 2011 documented that 90% of recipient households have at least one vulnerable member, defined as someone age 60 or older, age 18 or younger, or disabled, for whom loss of heat in winter or cooling in summer could have serious safety and health consequences. As many of 37% of these households went without medical or dental care, 34% did not fill a prescription or took less than their required dose, and 19% became sick because the home was too cold. 77% of the LIHEAP households reported total annual household income of less than $20,000. The survey and results are available at http://www.neada.org/news/nov012011.html

Utility Expenditures Comprise a Higher Percentage of Average Annual Expenditures for Consumers Age 50+



Source: AARP Public Policy Institute analysis of 2009, 2010, and 2011 Consumer Expenditure Surveys.

A "rigorous examination" of implementing retail electric competition will show that Arizona's previous halt to the implementation of retail electric competition for residential customers was the right decision.

While AARP has made a good faith effort to respond to the Commission's questions, our overall recommendation is that the Commission determine not to move forward to design or implement retail electric competition for the following reasons:

- Consumers are likely to experience higher prices and there is no way that the Commission could ensure that prices for essential electricity service would remain affordable in a restructured electric market;
- Costs to implement retail competition will be significant, including an unknown level of stranded costs, as well as costs to implement licensing, billing, and market oversight;
- The risks to consumers that essential electricity service will be more expensive or subject to unfair and deceptive marketing actions by third party suppliers will increase;
- The transfer of authority over generation supply prices from state regulators to federally regulated wholesale markets carries potentially deleterious and unexamined consequences;
- The Commission's role to ensure resource adequacy and reliability would at best be severely hampered and possibly eliminated if utilities sold or divested their generation assets or transferred such assets to affiliates, shifting responsibility for resource adequacy to the wholesale market;

- The move to implement retail competition in Arizona is complicated by previous court decisions interpreting the existing statutory mandate and regulations adopted in 1996, thus making it unlikely that any attempt to implement retail electric competition can occur without serious and potentially costly controversy and further litigation.

AARP recommends that the Commission focus on the implementation of current Arizona law that requires oversight of utilities to ensure "just and reasonable" rates for essential electricity service.

RESPONSES TO THE QUESTIONS POSED BY THE COMMISSION

1) Will retail electric competition reduce rates for all classes of customers --residential, small business, large business and industrial classes?

No, rate reductions for all classes of customers cannot be guaranteed. Experience in other states has shown that larger customers may experience larger reductions in rates. Savings for residential customers, if any, are smaller or nonexistent, even without consideration of the additional costs imposed by a completive retail market structure.

When considering how retail electric competition could reduce rates for any or all classes of customers it is essential to understand two key points. First, the electric supply cost is the only component of rates that is subject to change under retail competition. Second, the electric supply cost component represents a much larger portion of the total rates paid by large business and industrial customers than it does of the total rates paid by residential and small commercial customers. Hence, a one percent reduction in the electric supply cost component will result in a larger percent reduction in the monthly bills of large industrial customers than in the monthly bills of residential customers.

Arizona retail customers currently receive a "bundled" electricity service that consists of three distinct components – supply service, transmission service and distribution service. Retail rates for that bundled service are set to cover the costs of those three components or distinct services. Under retail competition the electricity supply service would be unbundled from the transmission and distribution services, and sold separately at prices driven by wholesale markets that are regulated by the Federal Energy Regulatory Commission (FERC). Under FERC's approach to wholesale market pricing, the rate for electric supply service would be based upon the marginal costs of capacity and energy in wholesale markets rather than on the average cost of capacity and energy as approved by the Arizona Commission in rate proceedings.

There is no evidence to support any suggestion that the adoption of retail electric competition will result in lower prices or bills for residential customers in Arizona. The variables that could limit any potential positive impact on rates, include the following:

A. How would the wholesale market be structured and how will this market interact with the retail market in Arizona? Would Arizona have to join a Regional Transmission Organization that would then allow generators currently allocated to Arizona customers to sell power into the higher priced California market? How would rates in Arizona remain lower if power producers can sell into a higher priced market, thus potentially creating higher prices in Arizona due to the resulting scarcity of supply available for Arizona customers?;

B. Would the incumbent utilities claim that retail competition results in stranded costs[3] and how much would any stranded cost recovery, if allowed, add to consumers' bills?;

C. What costs will utilities incur to provide billing services to third party suppliers? What additional costs would utilities incur to unbundle rates and prices on customer bills, train employees and customers about retail competition and changes in the electric utilities' role in providing electric generation supply service?;

D. What are the additional costs for third party retail suppliers that will be layered on to retail prices offered to Arizona consumers, such as marketing costs and profit margins?; and

E. Will residential consumers have access to stable default or standard offer service? It would be disastrous for any scheme to adopt retail competition to eliminate the distribution utility's role in providing a stable default or standard offer service to residential customers not served by a third party supplier, thus threatening the affordability of essential electric service. AARP's comments address this issue in more detail in Question 4.

Analyses that purport to show benefits of retail competition in other states lack facts relevant to residential customers, while other expert analyses show a less rosy picture.[4] According to a recent analysis, prices in "deregulated" states

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[3] Stranded costs are costs incurred by utilities for their generating supply resources that they claim might be stranded in a competitive wholesale market because the utilities will lose the assurance of passing through those costs in customer rates at the retail level. Whether or not stranded costs would exist or be documented in Arizona is not known at this time, but in the original move to restructuring in 1996 stranded costs of $350 million for Arizona Public Power and $450 million for TEP were approved by the Commission.

[4] The COMPETE Coalition maintains that the move to restructuring has resulting in savings in electricity costs to consumers, but their publications are noticeably lacking in facts that are relevant to residential customers and their membership is primarily composed of commercial and industrial customers. See, e.g., Comments of the COMPETE Coalition in the New York Commission's Proceeding

are 3 cents per kWh above rates in regulated states. This gap is slightly higher than the gap of 2.8 cents per kWh that existed among these same states in 1997, the onset of the restructuring era.[5]

Furthermore, as substantiated by the examples presented below, the rate options and contract offers by third party suppliers have, in many cases, generally resulted in higher prices for residential customers compared to the distribution utility's default service even when that default service is procured in the wholesale market in competitive bids or auctions.

The U.S. Department of Energy's Energy Information Administration compiles data on average residential electricity prices from "restructured retail service providers" and "full service providers" (referring to the utility's default or standard offer). This chart lists all the states that are currently implementing a retail electric market for residential customers. This information reflects the average of the reported prices and so is not a reflection of any particular supplier or group of suppliers, but clearly documents a trend of higher prices charged by alternative suppliers in many states compared to the utility's default service.[6]

State	Alternative Supplier	Full Service Provider
Connecticut	18.37	17.92
District of Columbia	12.91	13.44
Delaware	12.78	13.72
Illinois	11.58	11.79
Massachusetts	16.14	14.49
Maryland	13.44	13.29
Maine	15.40	14.47
Michigan	13.25	13.27
New Hampshire	14.94	16.52
New Jersey	16.30	16.23
New York	19.27	18.06
Ohio	11.04	11.57
Pennsylvania	13.33	13.24

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on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy markets in New York State, Case 12-M-0476 (January 25, 2013). Contrast these statements with an analysis of Kenneth Rose, *State Retail Electricity markets: How are They Performing So Far?*, Electricity Policy.com, http://electricitypolicy.com/articles/4455-stateretailelectricitymarkets (available by subscription). Dr. Rose concludes that consumer benefits have not yet appeared or been documented, particularly for residential customers.

[5] See, American Public Power Association (APPA), *Retail Electric Rates in Deregulated and Regulated States: 2012 Update*, available at: http://www.publicpower.org/files/PDFs/RKW%5FFinal%5F%2D%5F2012%5Fupdate.pdf

[6] This chart was complied by the National Consumer Law Center based on EIA 2011 Electricity Annual report data.

Rhode Island	13.96	14.34

Note: All prices in cents per kWh format and reflect the price of the entire bill.

In addition, there are some recent studies undertaken by consumer advocates using utility data that compare prices charged by alternative suppliers and residential default service rates over a period of time. This evidence confirms the trend reflected in the EIA data above that residential customers who select alternative suppliers on average pay more than the default service procured by the distribution utility in the wholesale market.

- In **New York**, the Public Utility Law Project recently obtained data from Niagara Mohawk (a National Grid affiliate in upstate New York) that evaluated 8,709,449 residential customer gas and electric bills over a 24-month period. This study documented that between August 2010 and July 2012, 84 % of the residential electric bills and 92 % of the residential gas bills of those who switched to alternative suppliers were higher than the bills of those who decided to keep getting their supply from National Grid. And those statistics translated into huge disparities in consumer bills. For instance, the data showed that over that 24-month period, those with higher bills paid nearly $500 more for electricity and $260 for natural gas. In total, residential ESCO customers paid approximately $130 million more for 24 months of service than they would have paid had they not switched to ESCO service and instead received full service from the traditional utility for both electricity and natural gas. This study also specifically reported data for the low income customers served by Niagara Mohawk that were identified due to their receipt of LIHEAP and/or participation in the utility discount program, estimated as 33,015 electricity and 20,840 gas customers. Low income customers paid a net additional cost of $13.3 million during this study period compared to default electricity rates and $5.8 million during this same period for gas service compared to default natural gas rates. Only a very small percentage of low income customers paid lower prices when served by an alternative supplier, 8.5% of electric customers and 6.6% of natural gas customers. These savings were modest over the 24-month period, averaging $40 for electricity and $63 for gas. Finally, this same analysis confirmed that customers served by alternative suppliers were sent 377,736 final termination notices due to nonpayment, averaging 31,478 per month.[7]

[7] Direct Testimony of William D. Yates, C.P.A., on behalf of the Public Utility Law Project of New York, Inc., before the New York Public Service Commission, Proceeding for Niagara Mohawk Power Co. for

- A similar study in **Pennsylvania** focused on PPL Electric low income customers served by electric suppliers. This analysis resulted in the same unfortunate finding—over 70% of the low income customers served by an alternative supplier were paying more than the PPL Electric default service price at the time of the evaluation. According to the information provided by PPL in discovery to a consumer advocate organization who had intervened in the proceeding, more than 73% of its low income customers enrolled in PPL's low income benefit program who were currently being served by an alternative electric supplier were charged a higher price than PPL's default service price during this period.[8]

- The Citizens Utility Board in **Illinois** has published an evaluation of alternative natural gas prices charged to customers compared to utility natural gas supply service in its Gas Market Monitor. Based on an analysis of how natural gas supplier plans have actually impacted customer bills since 2003, 94% of the alternative natural gas supplier plans have resulted in higher prices for residential customers over the term of these contract terms compared to default service. The average customer loss is $1,202.00.[9] This trend has been evident for many years and for almost all suppliers.

- In **Ohio**, data submitted by the Ohio Partners for Affordable Energy in two recent natural gas proceedings in which the regulatory commission has proposed to eliminate default service and auction customers off to retail suppliers also demonstrates that the bulk of competitive natural gas supplier offers are higher in price than default service provided by the natural gas utilities.[10] Data provided by Columbia Gas of Ohio makes clear that customers purchasing commodity natural gas from unregulated suppliers have paid over $861 million since

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Natural Gas and Electric Rates, Case No. 12-G-0202 and Case No. 12-E-0201 (August 31, 2012).

[8] Direct Testimony of Stephen Krone, on behalf of Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania, before the Pennsylvania Public Utility Commission, Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the period of June 1, 2013 through May 31, 2015, Docket No. P-2012-2302074 (July 20, 2012).

[9] See CUB's Gas Market Monitor, available at:
http://www.citizensutilityboard.org/GasMarketMonitor.php

[10] See: In the Matter of the Joint Motion to Modify the June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM, Case No. 12-1842-GA-EXM, OPAE Exhibit 1, Direct Testimony of Stacia Harper (October 4, 2012) at 14 and Exhibit SH-3; In the Matter of the Joint Motion to Modify the December 2, 2009 Opinion and Order and the September 7, 2011 Second Opinion and Order in Case No. 08-1344-GA-EXM, Case No. 12-2637-GA-EXM, OPAE Exhibit 2A at SH-3, Direct Testimony of Stacia Harper (November 30, 2012).

the advent of retail choice for natural gas service. [11] According to this study, in the most recent six months for which data is available, Ohio customers served by marketers have paid $37 million more than what would have been charged for default natural gas service, and that figure does not include any winter heating months.[12]

The **Canadian** experience with retail competition for gas and electric service has shown similar negative results for residential customers. In a 2011 Report by the Office of the Auditor General of Ontario (Canada) the Auditor evaluated the performance of the Ontario Energy Board, the key regulator for natural gas and electricity sectors.[13] As part of this evaluation, the Auditor evaluated the Ontario Energy's Board complaint handling and enforcement activities for licensed electricity suppliers. In Ontario consumers can purchase electricity from the utility at a default service price (called the Regulated Price Plan) set by the Board or purchase from a licensed supplier. Approximately 15% of residential customers had selected an alternative supplier, primarily based on the marketing theme of "price protection and stability." Most of these supplier plans are fixed price for a 4-5 year period. The Auditor documented that the Board's customer complaints had significantly increased in recent years from 1,400 in 2006 to 4,300 in 2010 and totaled 17,000 over five years. In addition, the Auditor sampled customer bills from 2006 to 2009 from various suppliers and found that the supplier fixed price ranged from 8.49 cents per kWh to 10.53 cents per kWh but that during this same period the regulated default service price was 5.4 cents per kWh to 6.3 cents per kWh. The same retail customers paid from 35% to 65% more for their electricity compared to the highest default service rate over the term of their contract. Over the term of a five-year contract (which was typical of the contracts entered into by residential customers) a customer using 1,000 kWh per month would pay about $2,000 more for electricity than under the regulated default service plan. This Report also noted that the suppliers avoided the normal commercial business risk of collections due to the utility's purchase of the supplier's receivables and assuming responsibility for collecting the entire bill.

Even state sponsored websites that allow consumers to shop and compare offers show that third party providers do not offer savings—or lasting savings. For example, a review of the offers being made by alternative suppliers to **Connecticut** Light and Power customers revealed that the vast majority of the offers stated prices were higher

[11] Case No. 12-2637-GA-EXM, OPAE Ex. 2A at Exhibit SH-7.

[12] Id.

[13] This Report is available from the Auditor General of Ontario at http://www.auditor.on.ca/en/reports_en/en11/302en11.pdf

than the default service price listed on the website. Of the 57 supplier offers listed, only 11 show that a customer using 750 kWh would see any savings at all on a fixed price contract comparable to the standard service plan. Other offers that appear to give consumers savings are "promotional" in nature and only provide a lower price for 1-2 months, then rates would vary. The vast majority of these offers are higher than the current Standard Plan price.[14]

An analysis of the impacts of retail electric competition on low income residential customers is included in a recent Report issued by AARP's consultant, Barbara Alexander, "An Analysis Of Retail Electric And Natural Gas Competition: Recent Developments And Policy Implications For Low Income Customers" (June 2013), that is attached to these comments.

2) In addition to the possibility of reduced rates, identify any and all specific benefits of retail electric competition for each customer class.

AARP urges the Commission not to make any conclusions about "the possibility of reduced rates" or "specific benefits" for the residential class based on alleged theoretical benefits. Most importantly, the Commission should consider what customers actually want—the lowest price for their essential electric service. While consumers value competition generally, the primary objective for most residential customers is reliable electric service at a reasonable price. In the experience of other retail competition states, residential customers may be offered a variety of pricing options and additional services and products bundled with generation supply service. But, most customers do not choose these options because they do not see sufficient savings or they don't think many of the marketing ploys (such as offering airline miles or other bonuses for signing up) are worth the higher prices or risks with many of the supplier contracts. The Commission should also consider that many of the valued options, such as the ability to choose solar or time-based rate options, are already available to Arizona consumers through their local utility and any move to retail competition should consider the potentially harmful impacts of not allowing utilities to offer these current programs.[15]

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[14] This evaluation was conducted in early March 2013 by AARP's consultant Barbara R. Alexander by reviewing the CT Energy Info website which provides such comparative pricing information for each Connecticut utility and for electricity and natural gas service. See, www.ctenergyinfo.com

[15] In most retail competition states the regulatory authority either halted or suspended time-varying rate offerings by distribution utilities and alternative suppliers have publicly argued that only the competitive market should offer time or us or other demand response programs.

Statistically valid surveys by AARP and others document that residential customers prefer stable pricing for essential electricity service, want the local utility to provide default service, do not favor variable rates or volatile rates, and want bill savings of at least 10% compared to current prices to bother with shopping and selecting an alternative suppliers.[16] As a result, it would not be reasonable to promote the transition to a retail electric market without robust evidence that residential customers would benefit and that documented bill savings will occur.

Providing consumers the *ability* to shop is not and should not be a goal in itself. Unless the Commission can assure consumers they will see real and sustained benefits from retail competition, there is absolutely no reason to move forward. Experience in other states shows the Commission is unlikely to be able to make such assurances.

3) How can the benefits of competition apply to all customer classes equally or equitably?

It is not possible for the Commission to ensure that the theoretical "benefits" alleged to occur with retail competition are distributed equally or equitably in a competitive market. Under a competitive retail model the Commission loses control over the price of generation supply, a significant component of the bill. In an unregulated market providers are not obligated to report or obtain regulatory review of their prices, which could change frequently. It is only though the exercise of its regulatory authority over the fully regulated utility that the Commission can equitably ensure reasonable prices for all customers.

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[16] AARP conducted a statistically valid survey of Connecticut residents age 50+ in 2013. A significant majority of respondents think it is important to have a standard offer plan that is priced at the lowest reasonable price. Two-thirds of respondents say it is extremely or very important for customers to have a standard Offer to use as a price point when comparing plans from alternative suppliers. Additionally, 82 percent support the requirement that Connecticut distribution utilities continue to provide this standard Offer to customers. This survey is available at: http://www.aarp.org/content/dam/aarp/research/surveys_statistics/general/2013/2013-AARP-Connecticut-Affordable-Energy-Survey-AARP-rsa-gen.pdf

The Maine Public Utilities Commission conducted a survey of residential customers in 2002 concerning the standard offer and competitive supplier offers. Two-thirds of the respondents preferred a lower priced standard offer compared to stimulating the retail market and having more choices in the competitive market from suppliers if the standard offer price was higher. Furthermore, 79% stated that they would need at least a 10% savings on the total electricity bill (not just the supply portion) to justify an interest in selecting an alternative supplier. http://www.maine.gov/mpuc/electricity/archive/electric_restructuring/appendixcresidential.pdf

On the contrary, it is highly likely that the results will be negative for residential customers if retail competition is implemented.

4) Please identify the risks of retail electric competition to residential ratepayers and to the other customer classes. What entity, if any, would be the provider of last resort?

There are considerable risks to residential customers if the Commission proceeds to implement retail electric competition, including:

- higher prices for essential electricity service;
- predatory market practices;
- volatile and unaffordable bill impacts if default service is not carefully structured or if the wholesale market results in higher generation supply prices compared to regulated cost of service prices;
- poor customer service from alternative suppliers;
- deceptive or unfair contact terms from third party suppliers that result in customer confusion and potentially higher prices without affirmative customer consent;
- additional costs incurred by the Commission to handle customer complaints and investigations of third party suppliers;
- door to door and telemarketing by third party suppliers that result in complaints, deceptive marketing tactics, resulting in higher prices for essential electricity service;
- higher prices for distribution services due to costs associated with the transition to a restructured market (such as stranded costs), mandates for efficiency and renewable energy, as well as utility costs to procure and administer a default service portfolio, additional costs to pay for regulatory enforcement and monitoring of alternative suppliers, billing changes (to unbundle current prices and accommodate charges from third party suppliers), and the additional costs for customer education initiatives.

Among the most serious risks is that consumers will not be provided a stable and regulated portfolio of default service contracts purchased by the distribution utility on their behalf. Any consideration of retail competition should include an obligation imposed on the distribution utility to provide default service for those who choose not to choose a third party supplier at stable prices and lowest cost. In every restructuring state other than Texas the distribution utility is required to obtain default service from the wholesale market and pass the resulting costs to default service customers. This will require the Commission to consider and implement policies that assure that distribution utilities procure this service pursuant to contract terms that are favorable to

consumers.

Proponents of moving to retail competition often also suggest that consumers not served by third party suppliers should be exposed to volatile and short-term wholesale market prices. There is considerable risk to consumers under this regime. For example, Texas initiated retail competition with a default service that passed through savings compared to prior electricity prices, but then abandoned this approach and has eliminated stable default service in favor of a Provider of Last Resort service that passes through hourly default service prices to customers not otherwise served by a third party supplier. Rather, default service should be designed to reflect a prudent mix of wholesale market contracts that are intended to achieve least cost service over time for residential and small commercial customers. This should be done in a portfolio that reflects a multi-year plan and procurement method to avoid volatile and short term swings in wholesale market prices.

AARP opposes the reliance on any short-term and volatile "last resort" service provided to customers who are not otherwise served by a retail supplier.

5) How can the Commission guarantee that there would be no market structure abuses and/or market manipulation in the transition to and implementation of retail electric competition?

The Commission cannot fully guarantee there will be no market structure abuses and/or market manipulation in the transition to and implementation of retail electric competition. The Commission will have greater ability to exercise authority over the transition to retail competition than over its implementation. Once retail competition is in effect, the Commission will have no jurisdiction over the establishment of prices for electricity supply service in wholesale markets. At that stage the Commission will have to rely upon regulatory oversight by FERC.

At the transition stage the Commission will need to establish a number of policies and regulations in order to prevent market structure abuses. Based on the restructuring experience of other states these policies and regulations should ensure that existing retail rates are unbundled in a reasonable manner and that competitive retail suppliers are provided equal access to utility transmission and distribution services. The Commission would have to pay particular attention to the establishment of policies governing transactions between utilities and their unregulated marketing affiliates as well as policies governing access to data on individual customers. These issues are highly controversial and will require substantial time and resources on the part of the Commission to develop these

policies and resolve disputes about what policies should be imposed, as well as disputes and potential litigation about how they should be implemented in specific situations. For example, in the development of the original retail competition rules in 1996 Arizona experienced significant controversy about whether or how vertically integrated utilities should be structurally separated and whether retail marketing affiliates of those utilities could use the utility's logo in an attempt to sell electricity to the distribution utility's customers.

Even with respect to the potential market abuses in the retail market, the Commission cannot guarantee that there would not be retail market structure abuses and/or market manipulation in the implementation of retail electric competition. The retail market abuses have occurred in every restructuring state and will occur in Arizona.[17] The costs to provide oversight and enforcement for hundreds of potential retail suppliers are significant and no state regulatory commission has implemented this oversight without difficulty, expense, and time consuming litigation and potential court related appeals.

6) What, if any, features, entities or mechanisms must be in place in order for there to be an effective and efficient market structure for retail electric competition? How long would it take to implement these features, entities, or mechanisms?

It is not clear what the Commission means with respect to "effective" and "efficient" market structure. The electricity market is unlike any other consumer market. Electricity cannot be stored and it must be available on an instantaneous basis. Consumers without affordable electricity suffer serious medical and health and safety conditions. Consumers also need stable electricity prices and they cannot typically change their usage to respond to rapid changes in prices at the wholesale level. Residential electricity demand is typically very inelastic compared to, for example, an industrial facility that can invest in changes to its production cycle or reduce its electricity needs with different equipment or technologies. As a result, regulators at both the state and federal levels have continued to impose some level of "regulatory" oversight even for so-called competitive wholesale and retail markets. If there is any doubt about the need for regulatory oversight of restructured electricity markets one need only review the tariffs on file with FERC-approved Independent System Operators, which are lengthy and complex. As a result, the purpose of any restructuring objective in Arizona should not be to create a competitive market for its own sake, but to carefully evaluate how to provide the most cost effective and affordable electricity for consumers.

[17] Ms. Alexander's Report attached to these Comments includes a recitation of market abuses that resulted in regulatory investigations and enforcement actions with respect to third party suppliers.

There is no basis for concluding that a retail market for electricity can result in lower prices for essential electricity service for residential customers. Indeed, there is ample evidence to suggest otherwise as documented in these Comments.

7) Will retail electric competition require the divestiture of generation assets by regulated electric utilities? How would FERC regulation of these facilities be affected?

It is possible to implement retail electric competition without requiring regulated electric utilities to divest their generation assets. However the vast majority of utilities in states with retail competition have divested their generation assets by either selling these assets to other owners or transferring these assets to structurally separate affiliates.

The push for divestiture is driven by two main factors, a desire by policymakers to create a competitive wholesale market and a desire by utilities to recover stranded costs. First, there is the desire to establish a competitive wholesale market with numerous sellers that could serve all customers. If generating supply assets remain under the control of the distribution utility, the potential for market abuse is obvious. The rationale was that a utility limited to providing transmission and distribution service would be more likely to treat all competitive suppliers equally. Second, in some states, such as New Jersey and Pennsylvania, utilities wanted to divest their generation assets because they expected that their unbundled electricity supply service would not be competitive, and that they would not be able to recover all of the costs that had incurred to provide those generation assets. In those situations the utilities themselves pushed for divestiture and for recovery of the "stranded costs" associated with those assets, where stranded costs are the fixed costs of the capacity in excess of the net revenues the utility could recover at market prices to pay for those fixed costs.

If a regulated utility sells its generation assets the prices charged for service from those assets are no longer subject to economic regulation by the Arizona Commission on a "cost-of-service" basis, but instead are subject to regulation by FERC. The new owners of these assets must request FERC approval to sell the capacity and energy provided by these assets at "market-based rates". Before FERC will approve that request the new owners must demonstrate that they and their affiliates lack or have adequately mitigated horizontal and vertical market power in the regional wholesale markets in which they plan to sell energy and capacity or other services. Basically they must demonstrate that there are sufficient competing suppliers of similar size such that no one supplier, including themselves, can exercise market power and set or control the market price. If the new asset owners cannot meet that test, FERC

may require them to sell the capacity and energy provided by these assets at prices based upon cost of service. While this oversight appears reasonable in theory, there are very few instances in which FERC has not approved market-based rates for any generation supplier.

FERC has jurisdiction over wholesale transactions and has the authority to investigate market manipulation and violations of its regulations and approved tariffs. There have been many instances of market manipulation in wholesale energy markets, most recently including a case in New York involving Constellation Energy[18] and separate cases in California involving Deutsche Bank[19], JPMorgan[20] and Gila River Power.[21] The latter case is of particular significance since Gila River Power is an independently owned generating facility located in Arizona and admitted violations of FERC's regulations by selling power into the California power market in a manner that disguised its intent. The FERC orders in these cases indicate that it often takes 2-3 years from the time FERC detects market manipulation and obtaining a final order or settlement to correct it and obtain fines or disgorgement of improper profits. Furthermore, there is often controversy about whether the retail customers who have suffered the higher prices that occurred with these violations actually receive compensation as a result of the violations and settlements.

Finally, the Arizona Commission should consider that many states that originally adopted retail competition eventually suspended or repealed it particularly with respect to residential and smaller commercial customers because they were opposed to the wholesale market structure and market prices that FERC ultimately approved and established. These states include California, Oregon, New Mexico, Nevada, Montana, and Virginia.

8) What are the costs of the transition to retail electric competition, how should those costs be quantified, and who should bear them?

AARP is unable to provide any cost estimates or projected timelines for the implementation of retail electric competition since the data to answer these questions is primarily in the control of the electric utilities and within the Commission itself (in terms of available resources and skills to supervise a competitive market). However, based on experiences in other states, the transition to retail competition and its

[18] FERC Docket No. IN12-7-000, Order issued March 9, 2012.
[19] FERC Docket No. IN12-4-000, Order issued January 22, 2013
[20] JPMorgan loses California power sale fight at FERC. June 10, 2013. http://www.reuters.com/article/email/idUSL2N0EM0U020130610
[21] FERC Docket No. IN12-8-000, Order issued November 19, 2012

implementation can be costly. If these costs are imposed on ratepayers, any such cost estimates should be carefully evaluated to determine whether the predicted value would actually be returned to residential customers.

9) Will retail electric competition impact reliability? Why or why not?

Yes, there are potential impacts on reliability of service if Arizona adopts retail electric competition.

Retail electric competition does have the potential to have an adverse impact on the reliability of the wholesale market power system depending on the manner in which it is designed and implemented. The reliability of the bulk power system is primarily dependent on sufficient resource adequacy and sufficient transmission system security. Sufficient resource adequacy requires that a sufficient quantity of supply and demand-side resources be available to meet system load, especially during stressful periods such as during a summer peak. Sufficient transmission system security requires that the power required to serve load can keep flowing during all times, even during times when multiple transmission lines, major generators, or other bulk power system elements are out of service.

Under the current market structure the major electric utilities that own and/or operate transmission in the state and own or contract for power supplies are responsible for reliability of the bulk power system serving Arizona retail load. The utilities, referred to as "balancing authorities", are Arizona Power, Tucson Electric Power, Salt River Project as well as the Federal Western Area Power Administration (WAPA) and the Lower Colorado region (WALC). They are responsible for identifying the need for investments in generating capacity and transmission infrastructure making those investments and operating the bulk power system on a day-to-day basis. Of these three responsibilities the key responsibility is making the investments in new generation and transmission assets. Under the current market structure Arizona Power, Tucson Electric Power and Salt River Project each own or control generating and transmission assets and the Arizona Commission sets the rates those entities can charge to recover the costs of their assets. As a result, the Commission currently has considerable ability to ensure that Arizona Power, Tucson Electric Power and Salt River Project each fulfill that key responsibility.

Under retail competition the Commission will have less ability to enforce resource adequacy or ensure such investments are made. How much that ability will be weakened will depend on the manner in which retail competition is implemented. This is a concern because FERC's approach has been to rely upon market forces to determine what additional investments are made in generating assets and when. So, there is a possibility that the

Commission does not have sufficient enforcement leverage to force one of the state's utilities to make the necessary investment and FERC will not force those investments either, leaving consumers to rely on market forces to ensure an adequate power supply.

Texas provides a specific example of a state with retail electric competition where significant concerns have been raised regarding generation supply reliability. There is intense public scrutiny and debate where the state-regulated Electric Reliability Council of Texas (ERCOT), which manages the Texas grid said in May that it expected record peak demand for electricity of 68,383 MW this year. This is above the record August 2011 peak of 68,299 MW. If the 550 power plants in the region are able to handle the load this summer it will be by a slim margin. ERCOT forecasts that its summer reserve margin will be just 8.1%, the lowest reserve margin in any wholesale market. The North American Electric Reliability Corp. (NERC) considers a 15% cushion to be the bare minimum. Under the Texas market structure, ERCOT does not regulate the capacity market and cannot order generators to build new power plants. As a result, ERCOT has announced huge increases in prices that generators can charge in an effort to incent the suppliers to keep plants on line.[22] These higher prices at the wholesale level are likely to be flowed through to retail prices charged by third party suppliers.

New Jersey and Maryland have also raised concerns regarding the ability of their regional (PJM) wholesale markets to attract enough new capacity to ensure resource adequacy at reasonable prices in the long-term. PJM requires the load serving entities (LSEs) that operate in that market to hold sufficient capacity to serve their retail loads for a 3 year planning horizon. However, beyond three years these generating entities are under no obligation to bring on new capacity and PJM relies upon capacity auctions held three years in advance to attract sufficient new capacity. But ultimately there is no entity that is under an obligation to invest in sufficient capacity to ensure resource adequacy, the premise is that capacity prices will keep rising to the point where a merchant provider has sufficient financial incentive to make that investment.

New Jersey regulators have approved a long-term contract with a merchant generating company to provide it the incentive to build a new combined cycle unit and locate it in New Jersey. New Jersey is recovering the cost of this new unit from all of the state's customers through a distribution service charge.[23] Maryland has proposed a similar initiative.[24] These proposals were

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[22] The following article published by Forbes Magazine describes the situation in Texas: http://www.forbes.com/sites/christopherhelman/2013/06/19/will-summer-blackouts-doom-the-texas-boom/

[23] On January 28, 2011, Governor Christopher Christie signed into law P.L. 2011, c. 9, amending and supplementing P.L. 1999, c. 23, establishing a Long-term Capacity Agreement Pilot Program (LCAPP) to promote the construction of qualified electric generation facilities for the benefit of New Jersey's electric consumers. On February 10, 2011, the New Jersey Board of Public Utilities (BPU) issued an Order initiating a proceeding to implement the actions the BPU is required to undertake by P.L. 2011,

opposed by PJM.[25]

These initiatives raise significant concerns that relying on the wholesale market to ensure that long term capacity and energy will be provided in a restructured market. Furthermore, the fact that new costs to assure reliability of supply are being shifted to distribution service customers directly contravenes the separation of distribution and generation supply services that was undertaken at the time of restructuring and exposes those customers to risks and costs that were supposed to be borne by competitive suppliers. Arizona should carefully examine these situations and not follow this path.

10) What are the issues relating to balancing area authorities, transmission planning, and control areas which must be addressed as part of a transition to retail electric competition?

Under the current market structure Arizona Power, Tucson Electric Power, Salt River Project as well as the Federal Western Area Power Administration (WAPA) and the Lower Colorado region (WALC) are the balancing authorities responsible for reliability of the bulk power system serving Arizona retail load. As discussed in response to question 9, the design of any new market structure allowing retail electric competition for all customers must address the assignment of load service responsibility for capacity and energy within each balancing area. Balancing area authorities, who are synonymous with "control area" authorities, must know the load service obligation of each Load Serving Entity (LSE) in order to ensure reliability and to allocate the costs for resource adequacy, transmission planning and use fairly among all LSEs. For example, Arizona Public Service (APS) currently uses a 15% planning reserve margin, which means that they make the investments and acquisitions needed to ensure they own or control enough firm capacity resources to cover at least 115% of their peak load requirement. The costs of these acquisitions are then reviewed and approved by the Arizona Commission.

If Arizona decides to implement retail competition, it will have

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c. 9, referred to on this website as the LCAPP Law. The Long Term Capacity Agreement Pilot Program (LCAAP) proceeding, NJ BPU Docket No. EO11010026.

[24] Maryland Public Service Commission, Case 9214, In The Matter Of Whether New Generating Facilities Are Needed To Meet Long-Term Demand For Standard Offer Service, "Notice of Approval of Request for Proposals for New Generation to be Issued by Maryland Electric Distribution Companies", Sept. 29, 2011
http://webapp.psc.state.md.us/Intranet/casenum/NewIndex3_VOpenFile.cfm?filepath=C:\Casenum\9200-9299\9214\Item_77\\Case%209214%20RFP%20Issuance%20Order.pdf

[25] FERC Docket ER11-2875-00 and Docket No. EL11-20-000, initial Order issued April 12, 2011, PJM Interconnection, L.L.C., 135 FERC ¶ 61,022 (2011) (April 2011 Order).

to determine who will bear this vital resource adequacy responsibility. Most states where divestiture has occurred are now part of a Regional Transmission Organization (RTO) operated by an Independent System Operator (ISO) and the tariffs and capacity market programs implemented by these regional power markets are regulated and approved by FERC. The approach to resource adequacy varies from ISO to ISO, but the most typical approach is to require load serving entities (generators) to control sufficient capacity to meet a planning reserve margin for anywhere from 1 year to 3 years, with the results that are described in our response to Question 9.

Similarly for transmission planning, APS and other balancing authorities currently plan and invest in their transmission system to ensure reliable service for their full retail load. If APS (and other Arizona balancing authorities) were to continue to plan the transmission system to meet the load for all customers, including those served by competitive retail entities, they must be able to continue to recover the costs for transmission planning and use from all those customers.

Clearly, the Commission will need to carefully consider the implications of the wholesale market structure that would be implemented in the western power market and the potential loss of authority over wholesale market generation and transmission planning and investment if there is any significant divestiture of generation supply resources as a result of retail competition.

11) Among the states that have transitioned to retail electric competition, which model best promotes the public interest for Arizonans? Which model should be avoided?

AARP does not recommend that the Commission follow any model for restructuring. The Commission should continue its current path of relying on traditional cost of service regulation to ensure reasonable and fair rates charged by electric utilities. However, of the restructuring models that exist, the Texas approach is worse for consumers and should not be adopted. Under the Texas model, there is no default service provider and the distribution utility severed its relationship with customers. The alternative suppliers have the sole retail relationship with customers and are responsible for billing and collecting for their services pursuant to contract terms and regulations adopted by the Texas PUC. The Provider of Last Resort service is priced by regulation at 130-135% above prevailing wholesale market prices and is the most expensive option in the Texas market. POLR is designed to be a temporary service to provide electricity to customers

whose supplier suddenly exits the market. As a result, all Texas consumers must select an alternative supplier to obtain electric service and those customers disconnected for nonpayment must pay their debt to one supplier before obtaining service from another supplier. Another unique aspect of the Texas market model is that the wholesale market entity (ERCOT) is subject to the regulation of the Texas PUC and not FERC, an option that is not available in Arizona or elsewhere.

Several studies have documented that Texas residential consumers that reside in areas subject to competition pay higher prices than consumers served by municipal and public utilities that have retained control over their generation supply prices and assets.[26] Under the Texas market model, a recent report documented:

- Texans in deregulated areas of the state have consistently paid higher average annual electricity prices than Texans outside deregulation. This added expense has cost a typical customer under deregulation more than $3,000 since the beginning of retail competition.
- Electricity prices above the national average have cost Texans more than $11 billion during the 10-year history of retail competition. Only recently has the trend of above-the-national-average prices in Texas changed.
- The number of electric providers has increased under the deregulation law — but so has the complexity of electric contracts. Complaints from electricity customers have been much greater during deregulation, as compared to complaints filed annually prior to deregulation.
- Texas had the highest generation reserve margins in the nation prior to the implementation of the deregulation law. Texas now has among the lowest. This has led to serious reliability challenges for the state's power grid.
- There have been two statewide rolling blackouts in four years under deregulation, and at least nine reliability emergencies last year alone. By contrast, the state's grid operator ordered statewide rolling blackouts only once in 30-plus years before deregulation.
- Some generators have recommended market changes designed

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[26] *Deregulated Electricity in Texas: The First 10 Years of Retail Competition* was commissioned by the Texas Coalition for Affordable Power ("TCAP"), a nonprofit coalition of 163 municipalities and other political subdivisions, the report tells the story of retail electric deregulation in Texas from the beginning. It was released digitally on the TCAP website (http://historyofderegulation.tcaptx.com/) and includes recent pricing data and in-depth articles focusing on energy policy. It updates an earlier report from 2009.

specifically to increase their profit margins. Many of these proposals abandon competitive principles, and instead rely upon artificial price supports and regulatory intervention to engineer higher prices. But generators offer no guarantee that new supplies will be added to stay ahead of the demand for electricity.

12) How have retail rates been affected in states that have implemented retail electric competition?

See AARP's Response to Question #1 and Question #11.

13) Is retail electric competition viable in Arizona in light of the Court of Appeals' decision in Phelps Dodge Corp. v. Ariz. Elec. Power Coop., 207 Ariz. 95, 83 P.3d 573 (App. 2004)? Are there other legal impediments to the transition to and/or implementation of retail electric competition?

This decision held that several key aspects of the previously adopted retail competition rules were unconstitutional, particularly those dealing with corporation separation and reliance on market based rates instead of the statutory obligation to establish reasonable rates that reflect a fair rate of return. This decision specifically thwarted the prior Commission's proposal to rely on "market based rates" as a substitute for "just and reasonable" rates as required by Arizona law. As a result, any move to reopen this debate is likely to result in costly and time-consuming controversy and litigation.

As stated by the Court,

> Therefore, although the Commission may be influenced by market forces in determining what rates are "just and reasonable," the Commission may not abdicate its constitutional responsibility to set just and reasonable rates by allowing competitive market forces alone to do so.
>
> We reject the Commission's contention that its approval of a broad range of rates within which the competitive marketplace can operate satisfies the Commission's obligation to set just and reasonable rates because standard offer rates will necessarily serve as a rate cap. The Commission assumes that consumers will choose an ESP only if it offers a lower rate than an Affected Utility, thereby forcing ESPs to charge just and reasonable rates. As the Council points out, however, the decision to switch to and then stay with an ESP may turn on other factors, such as reliability

of service, notwithstanding the higher rate charged by an ESP.

Additionally, even assuming a customer chooses an ESP due to its lower rates, once the ESP is established in the market, it may increase its rates within the approved range without regard to consumer fairness or a fair return, possibly banking on some consumers' natural reluctance to constantly monitor rates, discover abuses, and then switch services.

¶32-34.

14) Is retail electric competition compatible with the Commission's Renewable Energy Standard that requires Arizona's utilities serve at least 15% of their retail loads with renewable energy by 2025? (See A.AC. R14-2-1801 et seq.)

Other restructuring states have adopted renewable energy mandates. The renewable energy mandate is imposed on any seller of generation supply and is supervised by means of creating and monitoring that each supplier has purchased sufficient renewable energy credits to meet the mandate's requirements.

15) Is retail electric competition compatible with the Commission's Energy Efficiency Standard that requires Arizona's electric utilities to achieve a 22% reduction in retail energy sales by consumption by 2020? (See A.AC. R14-2-2401 et seq.)

Other restructuring states have adopted energy efficiency and consumption reduction mandates. Typically, those mandates are implemented by means of programs operated by the local distribution utility and paid for through distribution rates or surcharges. While not publicly acknowledged, this approach puts the distribution utility back into the business of attempting to impact generation supply usage and prices.

16) How should the Commission address net metering rates in a competitive market?

Regardless of the market structure, the Commission should ensure that other customers do not subsidize customers who elect net metering for their distributed generation facilities.

17) What impact will retail electric competition have on resource planning?

See AARP's response to Question #9 and #10.

18) How will retail electric competition affect public power utilities, cooperatives and federal controlled transmission systems?

In most states that have adopted retail electric restructuring the statutory mandate has exempted publicly owned cooperatives and municipal utilities. And, where such exemptions exist, most rural cooperatives and publicly owned utilities have elected not to implement retail electric competition. However, many of these entities have raised concerns about the impact of the resulting wholesale market structure on their ability to purchase power or negotiate terms at reasonable prices on behalf of their customers because the marginal cost pricing methodology in the regional wholesale market is often higher than the traditional cost of service prices.[27]

[27] See, e.g. the American Public Power Associations reports on electric restructuring cited in fn. of these Comments.

AN ANALYSIS OF RETAIL ELECTRIC AND NATURAL GAS COMPETITION: RECENT DEVELOPMENTS AND POLICY IMPLICATIONS FOR LOW INCOME CUSTOMERS

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June 2013

Barbara R. Alexander opened her own consulting practice in March 1996. From 1986-1996 she was the Director, Consumer Assistance Division, at the Maine Public Utilities Commission. Her special area of expertise has been the exploration of and recommendations for consumer protection, universal service programs, service quality, and consumer education policies to accompany the move to electric, natural gas, and telephone competition. She has authored "A Blueprint for Consumer Protection Issues in Retail Electric Competition"(Office of Energy Efficiency and Renewable Energy, U.S. Department of Energy, October, 1998). In addition, she has published reports that address policies associated with the provision of basic or "default" electric and natural gas service, smart meter pricing and consumer protection policies, consumer protection policies and programs that impact low income customers, and, in cooperation with Cynthia Mitchell and Gil Court, an analysis of renewable energy mandates in selected states. Her clients include national consumer organizations, state public utility commissions, and state public advocates.

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I. INTRODUCTION

The purpose of this paper is to summarize current developments in the residential electricity and natural gas retail markets in selected states, evaluate the potential impacts of these developments on low income customers, and identify key consumer protection and public policies that should be considered in light of these developments. For the purposes of this Report, "low income customer" is defined as those households who are eligible for or receive benefits to help pay the natural gas or electric bill from the Low Income Home Energy Assistance Program (LIHEAP), the Weatherization Assistance Program (WAP), and ratepayer funded discounts and bill payment assistance programs from the local electric or natural gas utility. In general, this eligibility is targeted to households with annual income of 150% or less of federal poverty guidelines, but the criteria differ slightly among the states. LIHEAP and WAP are primarily funded by federal appropriations. The costs of the utility sponsored rate discounts or other bill payment assistance programs targeted to low income customers are typically included in rates paid by other utility customers.

The states that will be the focus of this paper are Massachusetts, Illinois, Pennsylvania, and New York. These states have adopted retail electric and natural gas competition so that residential customers in these states can select an alternative supplier[1] to provide their commodity or generation supply service. These states license the alternative suppliers and promote the opportunity to select an alternative supplier. However, customers are not required to select an alternative supplier. In each of these states, the local electric or natural gas utility is obligated to provide "default" electric or natural gas supply service to any residential customer who has not selected an alternative supplier. The restructuring market model in effect in these states is typical of other states (other than Texas) that have adopted energy restructuring. The combined population of these four states reflects a large proportion of U.S. customers exposed to retail competition for essential energy services.

The evaluation of how low income residential customers fare in these retail energy markets is particularly important for several reasons. First, the lack of affordable essential electricity and natural gas (particularly when relied upon for home heating in colder climates and air conditioning in warmer climates) threatens the health and safety of all customers, but has particularly adverse impacts on vulnerable customers due to age (both old and young), medical condition, and underlying dwelling conditions. While the average residential customer pays 5-6% of their annual household income for energy bills, low income households often have to pay 10-20% or more of their income for these vital services. The comparison between the household income and the annual energy bill is referred to as the household "energy burden." Lower income households generally have a higher energy burden compared to non-low income families and, as a result, lower

income households experience a higher level of nonpayment, disconnection of service for nonpayment, late fees, deposit requirements, and other indicia of unaffordability. While the federal and state supported assistance programs constitute an important safety net to ensure affordable energy services for low income families, these programs are not funded sufficiently to meet the need. After the steep rise in federal funding under the American Reinvestment and Recovery Act of 2008, Congressional appropriations for LIHEAP and WAP has been dramatically reduced in the last several years. Programs funded by utility ratepayers are typically constrained to reflect policy decisions about the bill impacts associated with shifting costs to other ratepayers. As a result, any increase in rates and charges for these essential electric and natural gas services compound an already difficult situation because price increases may substantially lessen the impact of the intended protection associated with the federally funded and utility sponsored bill payment assistance funding. When prices go up and financial assistance programs are constrained so that the impact of these price increases cannot be matched, the result is a "lose-lose" for lower income customers. Furthermore, other customers who fund the utility-sponsored low income programs bear the burden of potentially increased low income program costs and the additional costs associated with bill collection and disconnection of service when bills become unaffordable. Only the retail supplier "wins" when they sell electricity or natural gas supply to low income customers that costs more than default service.

Second, there is an increased level of marketing by a larger number of electricity and natural gas suppliers in most states and particularly in the states that are the subject of this Report. This increased marketing activity targeted to residential customers has resulted in a significant increase in customer complaints and calls for heightened state regulatory commission oversight of marketing practices and allegations of fraud and misrepresentation. Consumers have alleged and some commissions have documented that some alternative suppliers, particularly those that rely on door-to-door marketing and telemarketing for sales to residential customers, appear to promise savings or "peace of mind" when the actual result is a more volatile variable rate or a fixed rate that is higher than the utility's default service price over the term of the contract. Many of these supplier contracts also contain high early termination fees so that customers who discover that they are paying more are trapped into a high priced contract unless they pay an early exit fee that has been documented as over $500 in some contracts and generally ranges from $100-$150. As a result, there is increased attention being paid to the consumer protections, disclosures, and licensing provisions applicable to retail suppliers for essential electricity and natural gas service

Finally, there are ongoing regulatory policy developments in these States with regard to default service, particularly with respect to regulatory initiatives designed to "push" customers into the retail market, reduce the reliance on default service provided by local distribution utilities or eliminate it altogether. These policy developments make the program rules about how low income programs interact with retail suppliers even more important. A number of these initiatives

are designed to make default service more volatile (and potentially unaffordable) or eliminate the utility's role in providing this service altogether. The proposal to make default service more volatile and higher priced has important implications for affordability if the alternative suppliers do not offer a means to lower the monthly bill. The fact that these initiatives to make default service more volatile or eliminate it altogether are being promoted at a time of lower electricity and natural gas prices is particularly troubling. The lower electricity and natural gas prices are the result in part to the economic recession, lower demand for electricity by commercial and industrial customers, and the impact of increased supply of less expensive natural gas that has lowered both natural gas and electricity prices in the wholesale markets. As a result, just at a time when electricity and natural gas prices are coming down and reflected in default service prices for residential customers, alternative suppliers and some policymakers are promoting initiatives to eliminate this low cost option for customers.

Even if suppliers do not particularly target their products and services to low income customers per se (and some suppliers do in fact target such customers in their door-to-door marketing campaigns), most suppliers market their products and services to promote the potential for savings or price stability compared to the utility charges for default service. As a result, there is an understandable heightened interest by lower income households in selecting an alternative supplier when the primary motivation is to save money on the monthly utility bill or to avoid volatile prices changes and lock in savings if that is promoted by the supplier. While some states have not allowed low income customers participating in certain assistance programs to select an alternative supplier, others have accommodated the participation of such customers in retail energy markets and have developed policies to maintain the bill credits or benefits from low income bill payment programs when a customer selects an alternative supplier.

These developments suggest that a closer analysis of whether low income customers are benefiting in the competitive retail energy markets is warranted.

II. EXECUTIVE SUMMARY

Background on Retail Energy Markets. Pennsylvania, Massachusetts, Illinois and New York adopted restructuring and retail competition for electric generation supply and natural gas supply as part of a wave of endorsement for creation of such competitive markets in the late 1990's. While each of the state statutory mandates differs to some degree, the basic regulatory structure is similar.

In these states and in most of the states that have sought to implement the retail competition model, the utilities were required to separate their distribution or delivery service from their generation supply service. The distribution utilities retain the obligation to serve and ensure the reliability of the substations, poles and wires (electricity) or pipelines (natural gas) that compose the distribution system, as well as the primary responsibility for billing and collection for the monthly bill, the metering systems, and the delivery of approved low income programs and consumer protection policies applicable to billing and collection. The distribution service is regulated under traditional cost of service rates.

In addition and important for this Report, the state mandates for electricity and natural gas competition include an obligation imposed on the distribution utilities to provide "default" electric and natural gas service to customers who have not chosen an alternative supplier. In other words, residential customers have the option to select an alternative supplier for electricity or natural gas supply service. But, they are not required to do so and residential customers can continue with or return to default service without fees or penalties charged by the distribution utility. Since the distribution utilities no longer own generation supply, states have developed policies to govern how the local utility purchases generation supply for default service in the wholesale markets. How this default service is procured and the design of its price is a crucial policy issue that has particular impact on the stability and affordability of essential energy services.

The retail market for energy services has developed a more sustained level of activity in many states in recent years, particularly with respect to electric service. The rate of residential electric customer migration and the number of active suppliers seeking residential customers has increased since 2008-2009 in most states. The statewide average for residential customer migration to alternative suppliers is approximately 20% in New York and higher with some utilities. The migration rate in Pennsylvania has increased sharply since the end of the rate cap period in 2009 and is over 30% for some distribution utilities. While the retail market for electric service has been slower to develop in Illinois, there is an upsurge in marketing activities in the last 18 months, particularly with respect to municipal aggregation.

Unfortunately, from the consumer advocate's perspective, the stability of default service and the residential customer preference for that service have been

viewed as adverse to the development of a "fully" competitive market by some policymakers. Recently, many restructuring states have entered a new phase in which the state regulatory commissions are seeking to enhance and promote a reliance on retail energy markets and either reduce or eliminate the local utility' obligation to provide default service. Whether as a response to pressure from the alternative suppliers or the theory that default service constitutes a barrier to the creation of a retail energy market, some states have embarked on policies and programs designed to change the nature of default service and "push" residential customers into the arms of the retail suppliers. These regulatory initiatives as well as the increased marketing activities by many alternative suppliers, particularly with respect to door-to-door marketing in large urban areas, have sparked the need for this Report.

Experience of Low Income Customers in Retail Energy Markets. Basic electric and natural gas service are essential to all residential customers and the affordability of those services for low income customers whose energy burden is high in relationship to their income is crucial. The lack of affordable electricity and natural gas for home heating, refrigeration, and cooling is not the equivalent of the retail market for most other consumer goods and services, for which substitutes exist. The lack of affordable electricity or natural gas for heating and cooling has dire consequences for residential customer health and safety.

A customer who enters in a retail contract with a supplier that ends up costing more than default service or more than another competitive service offer because the customer was not sufficiently knowledgeable about the pricing structure being offered or the supplier misled the customer with fine print that alters what appears to be a good deal on the "front page" of the contract has not merely suffered economic loss. The customer's household experiences threats to its health and safety, particularly for those who are elderly, young, disabled, or medically frail. This concern is heightened by the ability of the supplier to use the trusted local utility to bill and collect for the contract services and fees pursuant to the now almost universally approved purchase of receivables programs, thus resulting in the ability of the utility to threaten and disconnect for nonpayment of unregulated (and potentially higher) supplier charges.

Unfortunately, there is a growing body of preliminary evidence that many residential customers and particularly low income customers are paying higher prices than they would have paid for default service when they select an alternative supplier. The implications of these findings have not yet been confronted or considered by state regulators.

In **New York**, the Public Utility Law Project recently obtained data from Niagara Mohawk (a National Grid affiliate in upstate New York) that evaluated 8,709,449 residential customer gas and electric bills over a 24-month period. This study documented that between August 2010 and July 2012, 84 % of the residential electric bills and 92 % of the residential gas bills of those who switched to

alternative suppliers were higher than the bills of those who decided to keep getting their supply from National Grid. And those statistics translated into huge disparities in consumer bills. For instance, the data showed that over that 24-month period, those with higher bills paid nearly $500 more for electricity and $260 for natural gas. In total, residential customers served by alternative suppliers paid approximately $130 million more for 24 months of service than they would have paid had they not switched to alternative supplier service and instead received full service from the traditional utility for both electricity and natural gas. This study also specifically reported data for the low income customers served by Niagara Mohawk that were identified due to their receipt of LIHEAP and/or participation in the utility discount program, estimated as 33,015 electricity and 20,840 gas customers. Low income customers who selected an alternative supplier paid a net additional cost of $13.3 million during this study period compared to default electricity rates and $5.8 million during this same period for gas service compared to default natural gas rates. Only a very small percentage of low income customers paid lower prices when served by an alternative supplier, 8.5% of electric customers and 6.6% of natural gas customers. These savings were modest over the 24-month period, averaging $40 for electricity and $63 for gas. Finally, this same analysis confirmed that customers served by alternative suppliers were sent 377,736 final termination notices due to nonpayment, averaging 31,478 per month.

A similar study in **Pennsylvania** focused on PPL Electric low income customers served by alternative electric suppliers. This analysis resulted in the same unfortunate finding—over 70% of the low income customers served by an alternative supplier were paying more than the PPL Electric default service price at the time of the evaluation. According to the information provided by PPL in discovery to a consumer advocate organization who had intervened in the proceeding, more than 73% of its low income customers enrolled in PPL's low income benefit program who were currently being served by an alternative electric supplier were charged a higher price than PPL's default service price during this period.

The Citizens Utility Board in **Illinois** has published an evaluation of alternative natural gas prices charged to customers compared to utility natural gas supply service in its Gas Market Monitor. Based on an analysis of how natural gas supplier plans have actually impacted customer bills since 2003, 94% of the alternative natural gas supplier plans have resulted in higher prices for residential customers over the term of these contracts compared to default service. The average customer loss is $1,202.00. This trend has been evident for many years and for almost all suppliers.

In **Ohio**, data submitted by the Ohio Partners for Affordable Energy in two recent natural gas proceedings in which the regulatory commission has proposed to eliminate default service and auction customers off to retail suppliers also demonstrates that the bulk of competitive natural gas supplier offers are higher in price than default service provided by the natural gas utilities. Data provided by

Columbia Gas of Ohio indicates that customers purchasing commodity natural gas from unregulated suppliers have paid over $861 million more compared to the default service price for natural gas, which in Ohio is a reflection of monthly wholesale market prices. According to this study, in the most recent six months for which data is available, Ohio customers served by marketers have paid $37 million more than what would have been charged for default natural gas service, and that figure does not include any winter heating months.

The **Canadian** experience appears to reflect these evaluations in the U.S. In a 2011 Report by the Office of the Auditor General of Ontario (Canada) the Auditor evaluated the performance of the Ontario Energy Board, the key regulator for natural gas and electricity sectors. As part of this evaluation, the Auditor evaluated the Ontario Energy's Board complaint handling and enforcement activities for licensed electricity suppliers. In Ontario consumers can purchase electricity from the utility at a default service price (called the Regulated Price Plan) set by the Board or purchase from a licensed supplier. Approximately 15% of residential customers had selected an alternative supplier, primarily based on the marketing theme of "price protection and stability." Most of these supplier plans are fixed price for a 4-5 year period. The Auditor documented that the Board's customer complaints had significantly increased in recent years from 1,400 in 2006 to 4,300 in 2010 and totaled 17,000 over five years. In addition, the Auditor sampled customer bills from 2006 to 2009 from various suppliers and found that the supplier fixed price ranged from 8.49 cents per kWh to 10.53 cents per kWh but that during this same period the regulated default service price was 5.4 cents per kWh to 6.3 cents per kWh. The same retail customers paid from 35% to 65% more for their electricity compared to the highest default service rate over the term of their contract. Over the term of a five-year contract (which was typical of the contracts entered into by residential customers) a customer using 1,000 kWh per month would pay about $2,000 more for electricity than under the regulated default service plan. This Report also noted that the suppliers avoided the normal commercial business risk of collections due to the utility's purchase of the supplier's receivables and assuming responsibility for collecting the entire bill.

The evidence described in these examples is further supported when the offers being made by alternative suppliers are compared to the current default service price on the various websites promoted by state regulatory officials as the "official" website to shop and compare offers for residential suppliers. In many cases, the offers reflected in these lists confirm that most supplier offers are higher than the current default service price.

The Role of LIHEAP and WAP Providers in Retail Energy Markets. In reviewing the status of retail competition for electricity and natural gas service in these states, as well as the preliminary evidence about the potential adverse impacts on affordability when customers participate in these markets as documented above, it would appear reasonable to ask whether agencies that directly interact with low income customers to deliver energy assistance programs have had training or

experience relating to selecting an alternative supplier in the retail energy markets. In order to determine whether the LIHEAP and WAP delivery systems in these states are aware of issues relating to retail competition for natural gas and electricity or whether they have had interactions with their clients that either support or impact the preliminary evidence about supplier prices as compared to default service, informal conversations and interviews were conducted in these states. In each state, approximately 2-3 interviews were conducted with individuals involved in the delivery of LIHEAP and/or WAP to gather anecdotal experiences or describe training or educational outreach that is done or not done with their clients relating to retail energy markets.

As a result of these interviews, the following trends and preliminary conclusions are evident:

- In general, these agencies do not implement any specific outreach of education to their clients about the retail energy markets.
- These agencies have received anecdotal stories from their clients about offers they have received, as well as complaints and concerns about certain marketing tactics, concerns about the "truth" of some offers, and requests to provide information.
- In almost all cases, these agencies refer clients to the state regulatory agency to pursue complaints and concerns because that agency typically licenses alternative energy suppliers, but almost all indicated that they were not confident that the state agency complaint handling process was responsive to their client's concerns.
- Many agencies are frustrated with their lack of knowledge and training in this area. They are confused about the offers being promoted, as well as the ever-changing identify of active suppliers and their contract offers. As a result, many have adopted a policy that affirmatively avoids getting involved in these issues with their clients.
- Many community action agencies that deliver WAP and LIHEAP would like to engage in outreach and education with their clients if they had the resources and training to do so. This desire, however, is not typical of state agencies that deliver LIHEAP or WAP, perhaps concerned that any negative comments or pursuit of complaints may be viewed as contradictory to state policy that endorses the retail energy market.
- Several local community service agencies that deliver WAP were the most interested in potentially addressing the implications of selecting an alternative energy supplier with clients because the program typically involves an analysis of the client's energy bills and a premise visit to deliver the program's services, many of which include education on energy conservation.
- None of the agencies, state or private, had the resources in financial or personnel resources to monitor the retail energy markets and develop

training materials for their intake staff even if they were inclined to take a more proactive role.

- The multiple delivery mechanisms for WAP, LIHEAP, and the state-approved bill payment assistance programs funded by distribution utilities that exists in some states complicates the ability to develop or implement any consistent outreach and education for low income consumers. The multiple delivery mechanisms for energy and other assistance programs in fact contributes to customer confusion about retail competition and indirectly assists alternative suppliers who arrive at the door to discuss a new "program" and ask to see the energy bill, thus presenting themselves as part of the assistance or official energy program network. Furthermore, when different agencies and local providers operate these programs, there is no high level oversight of the implications of the retail energy market and the impact of the potentially higher energy charges on client affordability, and certainly less of an impetus for the development of proactive education and outreach programs to deliver as part of these programs.

Recommendations: As a result of these findings, the author recommends the following policy reforms at the state level:

State Regulators Should Take A More Proactive Role In Monitoring Retail Energy Markets And Determine Whether Customers, Particularly Low-Income Customers, Are Paying More To Some Or All Suppliers Compared To Default Service.

No state regulatory authority has undertaken the type of analysis to evaluate the prices charged by retail suppliers such as that conducted by some advocates in Illinois, Ohio, New York, and Pennsylvania. Instead, state regulators continue to rely on the theoretical benefits associated with retail competition, including an unwarranted emphasis on potential savings, increased value of service, and the ability to obtain innovative services. Even though the statutory mandate requires that retail energy competition be implemented, state regulators should assume the duty and responsibility for determining what is actually occurring in these markets for their most vulnerable consumers.

Affirmative Reforms Should Be Approved To Protect Low Income Customers In Retail Markets.

It is reasonable to recommend that affirmative steps be undertaken to ensure that either low income customers remain under default service or that there is a formal program implemented to ensure that alternative suppliers that serve such customers will provide a benefit in the form of a lower price. There are a variety of options to achieve this result that would benefit low income customers, ensure the most effective use of limited assistance program funds, and still ensure the implementation of retail market opportunities for such customers.

States Should Continue With Stable And Prudent Mix Of Contracts For Default Service.

Residential customers should not be pushed into the retail market by redesigning the current portfolio approach into a more volatile and higher priced service. Default service provides an essential tool for price comparison and shopping, as well as ensuring that a stable and affordable service is provided to customers who choose not to choose an alternative marketer or who cannot obtain alternative service on reasonable terms. This service is typically obtained in the competitive wholesale market and so reflects market-based pricing, a key intent when restructuring was adopted.

States Should Not Adopt Retail Market Enhancement Programs Designed to Promote Customer Switching to Alternative Suppliers Unless Benefits are Guaranteed.

In light of these findings that alternative suppliers generally charge more than default service and the growing level of customer complaints relating to energy marketers and suppliers, it may not be appropriate to adopt programs that are designed to require distribution utilities to push customers into the arms of suppliers. These programs include retail auctions, customer referral programs, and consumer education programs that promote shopping as a way to save money on the electric or gas bill.

State Regulators Should Adopt Reforms for the Disclosures of Price and Material Contract Terms Offered by Retail Suppliers.

The areas that need substantial reforms relate to variable rate contract disclosures and contract terms, door-to-door marketing and telemarketing sales activities, contract renewal reforms, and elimination or reduction in early termination fees. At a minimum, any such programs should reflect guaranteed savings to participating customers, rely on affirmative and voluntary participation, and include important consumer protections to ensure that alternative suppliers do not retain customers after the termination of the guaranteed savings term of the program without affirmative customer consent.

States Should Adopt a More Robust Oversight and Enforcement Program.

State regulatory commissions have an obligation to seek and actually implement the enforcement tools necessary for proper supervision of a retail market. Among the enforcement remedies that the state commission should seek statutory authority to implement include:

- The authority to adopt orders requiring adherence to marketing standards as a condition of eligibility to market electricity and gas;
- The authority to reject, suspend, and rescind a license for violation of the

regulations and licensing conditions;

- The authority to require suppliers to submit a reasonable bond or other financial instrument to be available to the commission upon a finding of violations and the return of any funds held for the benefit of customers;
- The authority to order suppliers to provide restitution to customers where misleading and unlawful behavior has occurred;
- The authority to order a supplier to halt the use of a particular marketing channel or activity when preliminary evidence suggests that such a suspension is warranted while a more formal investigation is completed, similar to a civil injunction to halt unlawful activity pending resolution of a formal complaint;
- The authority to assess civil penalties for violation of orders or regulation through an expedited administrative process; and
- The authority to assess licensing fees on suppliers that reflect the heightened level of supervision, education, and enforcement that has arisen in the implementation of retail energy competition.

III. BACKGROUND ON RESIDENTIAL AND LOW INCOME RETAIL ENERGY MARKETS IN SELECTED STATES

The following summary and description of these state restructuring programs and experiences is based on the more detailed state-specific history that is documented in Appendix A to this Report.

Pennsylvania, Massachusetts, Illinois and New York adopted restructuring and retail competition for electric generation supply and natural gas supply as part of a wave of endorsement for creation of such competitive markets in the late 1990's.[2] While each of the state statutory mandates differs to some degree, the basic regulatory structure is similar.

In these states and in most of the states that have sought to implement the retail competition model, the utilities were required to separate their distribution or delivery service from their generation supply service. The distribution utilities retain the obligation to serve and ensure the reliability of the substations, poles and wires (electricity) or pipelines (natural gas) that compose the distribution system, as well as the primary responsibility for billing and collection for the monthly bill, the metering systems, and the delivery of approved low income programs and consumer protection policies applicable to billing and collection. The distribution service is regulated under traditional cost of service rates that are established in rate cases that reflect the historical regulatory model by which public utilities have been regulated by states for over 100 years.

These same utilities were generally required to separate the generation portion of their business and either sell those assets to non-utilities or create a separate affiliate to operate those assets that would be legally separate from the state-regulated distribution utility. The natural gas utilities had previously divested their ownership of natural gas generation and transportation systems as part of a move to restructuring in that industry reflected in federal legislation in the 1980's.

As a result of these restructuring initiatives, electric and natural gas generation assets were sold or transferred in these states to entities that were no longer subject to any state regulatory authority. The authority to regulate the interstate or wholesale price of electricity and natural gas lies with the Federal Energy Regulatory Commission (FERC). This agency has supervised the creation of regional wholesale electricity markets, regional entities that regulate the interstate transmission systems and ensure that the electricity system operates in balance and with adequate reserves to assure reliability of service. For example, the ISO-New England (ISO-NE) supervises the wholesale and long distance transmission systems for the New England states (including Massachusetts) and PJM Interconnection performs the same function for the Mid-Atlantic and certain Midwest States (including Pennsylvania and Illinois). The New York wholesale market is supervised by ISO-New York (NYISO), which is a standalone system operator that is

unique to New York, but that also has a close cooperation with ISO-NE due to the interconnections of these systems. With regard to natural gas markets, FERC is responsible for the regulation of the interstate transportation of natural gas and the pricing of natural gas through these interstate pipeline systems, but there is no regional pipeline authorities for natural gas similar to the wholesale regional markets developed for electricity.[3]

In addition and important for this Report, the state mandates for electricity and natural gas competition include an obligation imposed on the distribution utilities to provide "default"[4] electric and natural gas service to customers who have not chosen an alternative supplier. In other words, residential customers have the option to select an alternative supplier for electricity or natural gas supply service. But, they are not required to do so and residential customers can continue with or return to default service without fees or penalties charged by the distribution utility. Since the distribution utilities no longer own generation supply, states have developed policies to govern how the local utility purchases generation supply for default service in the wholesale markets. How this default service is procured and priced is a crucial policy issue that has particular impact on the stability and affordability of essential energy services.

The components of a residential customer bill in these states include the regulated distribution service and generation supply service.[5] If a customer selects an alternative supplier, the supplier's charges for generation supply service often appears on the distribution utility's bill through a billing agreement between the alternative supplier and the distribution utility. If a customer has not selected an alternative supplier, the default service price appears in the generation supply portion of the bill. In theory, the customer can use this presentation of their default service rate in a per kWh or per therm format and compare that rate to those offered by suppliers.

State utility regulators also regulate alternative suppliers pursuant to the mandates of the original restructuring legislation. This regulation or oversight does not include price regulation, but does reflect the traditional consumer protection approach to the oversight of competitive businesses, including licensing, mandatory price and contract disclosures, prohibition of certain marketing conduct, and enforcement tools to ensure a minimum level of conduct. The state utility regulators also supervise the interaction between the distribution utilities and alternative suppliers in billing arrangements and the transfer of customer data to and from the utility and alternative supplier.

Since most states that adopted restructuring also included a transition period in which residential customers enjoyed either a mandated rate freeze or cap on generation supply prices, the early years of restructuring did not result in a great deal of controversy or any significant transition of residential customers to alternative suppliers. Even those suppliers that sought to create a strong marketing presence and seek customer enrollments found this path difficult with low default

service prices in effect in a period of rising wholesale electricity prices and natural gas prices that occurred in 2002-2003.

In addition, as part of the overall restructuring mandates, several states substantially expanded their utility-provided low income programs in the form of expanded eligibility, expanded discounts or benefits, and expanded enrollment methodologies during this period.[6] During the early period of restructuring from 2000-2005 it appeared that residential customers and low income customers would experience a "win-win" result from electric restructuring in particular.

However, this rosy scenario changed dramatically with the end of the transition period that had ensured rate caps and rate freezes for the generation supply or default service portion of the electric bill. After the end of the rate cap or rate freeze, distribution utilities that were obligated to provide default service had to purchase the electricity or natural gas in the wholesale markets since they no longer owned generation supply. In some cases, the utility had to purchase 100% of their default service obligation at a single point in time so that utilities that purchased during a period of high wholesale market prices had to pass through dramatic increases for this service and the impact on the overall electricity bill was widely viewed as unacceptable.[7]

In Maryland, when Baltimore Gas & Electric purchased default service in the wholesale market for 100% of its default service customers at the end of the rate cap period (those not served by an alternative supplier, which at that time was in excess of 95% of the residential customers), the result was an average total bill increase of 72% for Baltimore Gas & Electric's residential electric customers.

A small electric utility in Pennsylvania (Pike County Electric) obtained 100% of its default service obligation in the wholesale market in late 2006 after the expiration of its rate cap. The resulting price for default service (generation supply service) was a 129% increase compared to the pre-restructuring rate and the resulting prices caused a 75% increase in the average residential customer total bill.

Delmarva Power, the largest electric utility in Delaware, also purchased 100% of its default service obligation in 2006 and the resulting 56% average residential bill increase sparked widespread anger and frustration which led to the adoption of statutory reforms about the purchase of default service to prevent short-term price volatility.

As a result, a number of state specific statutory reforms were adopted to more fully supervise the procurement policies associated with Default Service. In general, these statutory amendments were designed to make default service more stable and a reflection of a mix of wholesale market contracts that were "laddered" or purchased over a period of time to avoid volatile price changes and unusual or dramatic changes in prices over time. After these statutory and regulatory reforms were adopted in 2006-2008, there are several trends common among the states

evaluated in this Report concerning how electric distribution utilities provide default service to residential customers.

- In the vast majority of restructuring states, Default Service is provided by the incumbent distribution utility pursuant to a "regulated" portfolio of wholesale market contracts. The term "regulated" refers to the state regulatory commission's decision on default service contract portfolio. However, the price is not "regulated" under cost of service principles. The contracts are typically acquired by means of a competitive auction or bid process supervised by the state utility regulator. The bids reflect wholesale market prices that are passed through to retail customers. There is no state has implemented a "retail" Default Service regime (in which a licensed retail electric supplier is awarded the obligation to provide Default Service for a utility's customers) for electric service provided to residential customers on a wide scale, although municipal aggregation has transferred customers to alternative suppliers in some states where the municipal or county authority has obtained bids for service that are lower than otherwise applicable default service prices.

- Where the utility is obligated to obtain Default Service by entering into wholesale market contracts, the price of those contracts (plus incremental costs incurred by the distribution utility to acquire this service) is typically passed through to its customers without profit by the local distribution utility. Although, of course, the default service price reflects some level of profit margin by the winning wholesale market suppliers and the administrative costs of implementing the default service acquisition by the distribution utility.

- Where the distribution utility is required to obtain Default Service in the wholesale market, the portfolio is typically composed of 6-month to three-year fixed price contracts that are obtained in a laddered time frame to ameliorate wholesale market price volatility and deliver a stable and fixed price for this service. Default Service prices change annually or semi-annually in most of these states depending on the results of the most recent auction or competitive bidding process, although quarterly price changes occur in Pennsylvania. In contrast to most states, New York has mandated a more volatile monthly pricing for Default Service for electric and natural gas utilities.

- The distribution utilities are typically required to enter into Purchase of Receivables (POR) programs in these states.[8] Pursuant to these programs, the utility purchases the receivables of the alternative supplier and bills and collects for those unregulated charges. Of particular relevance to consumer protection policies, this initiative means that the distribution utility will use its regulated collection practices, including disconnection for nonpayment, to

collect the unregulated supplier charges. This policy has implications for low income customers who may end up paying more for generation supply service by selecting an alternative supplier compared to default service, thus contributing to the unaffordability of essential electric or natural gas service.

- In general, the retail market structure identified above for electric service is also typical of natural gas supply service. However, default natural gas supply service is often purchased with a higher percentage of short-term wholesale market contracts and reflects more directly the movements in wholesale market prices. This is due in part to the historical way in which natural gas was purchased by fully regulated utilities and in part due to the dramatic drop in wholesale natural gas prices in recent years as a result of the increased supply of natural gas due to the use of shale gas and newer extraction technologies. Furthermore, the wholesale natural gas market, unlike the wholesale electric market, has publicly available and transparent wholesale market prices. As a result of the recent trend in the lower cost of natural gas supply, states have not been as interested in a stable portfolio of natural gas contracts, but have welcomed the results of relying on short-term contracts in today's market conditions. However, several states, including Pennsylvania, retain a statutory obligation to provide default natural gas service by means of a portfolio of contracts designed to ensure stability in the price of this essential service.

While these default service procurement policies were designed to ameliorate volatility in default service prices for residential and small commercial customers, the resulting pass through of wholesale market prices was a significant change from the historical reliance on cost of service rates for utilities that owned generation supply. Instead of reflecting a state regulatory authority's analysis of the actual cost of building and operating a generation plant or the actual cost of producing and transporting natural gas, generation supply prices now reflects the wholesale market emphasis on the marginal cost of energy. Under the approach adopted by FERC and implemented by the regional wholesale markets, electricity prices at any hour reflect the most expensive bid by generation facilities (or demand response providers). While it is not the purpose of this Report to evaluate the reasonableness of the FERC-supervised wholesale market structure, the result is a pricing method that emphasizes shorter term price fluctuations under the theory that competitors will seek to offer lower prices and gain market share and contribute to a long term lower price compared to a fully regulated market.

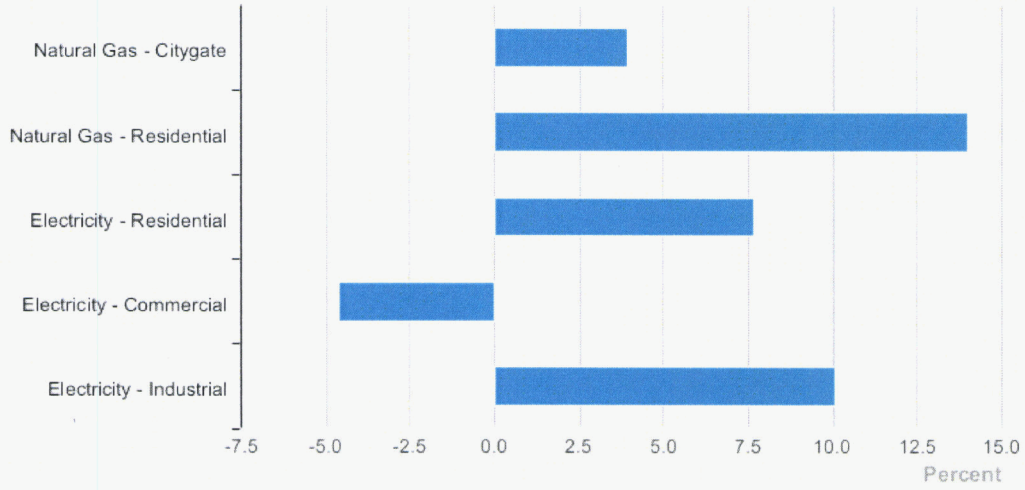
The end result is that default service electric prices increased at the end of the rate cap or rate freeze period in most restructuring states. The enactment of statutory policies to enable longer-term default service contracts and ameliorate short-term volatility in electric prices has not obscured the impact of the wholesale market ebb and flows entirely.

Has restructuring actually resulted in lower prices compared to the traditional

regulatory approach for generation supply service? In other words, has the FERC-regulated wholesale markets and the retail markets targeted to end-use customers resulted in the benefits that proponents of restructuring promised? The answer to this question has been highly contested and various studies have resulted in contrasting results and recommendations.[9] Furthermore, the answer may very well be different for larger commercial and industrial customers than for residential and small commercial customers. This Report cannot resolve or contribute to this debate with regard to the operation of the wholesale markets. However, it is fair to point out the following overall residential price trends that have occurred in the selected states for this analysis.

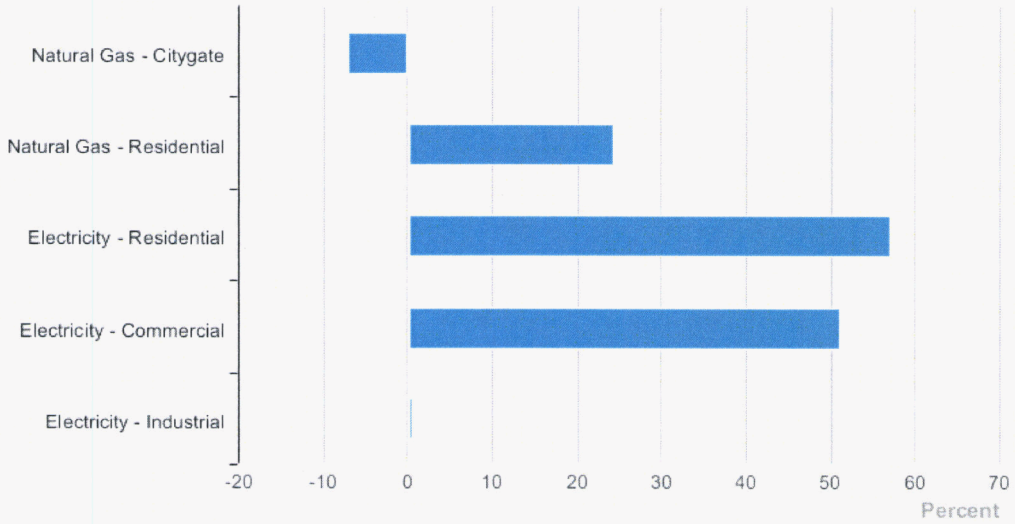
According to the U.S. Department of Energy's Energy Information Administration, the states that adopted restructuring were typically those with higher electricity prices than average and, with the exception of Illinois, have remained in that category. The Illinois experience is a reflection of the composition of their generation supply fleet and the delay in the implementation of retail electric competition compared to other restructuring states.

Pennsylvania Price Differences from U.S. Average, Most Recent Monthly



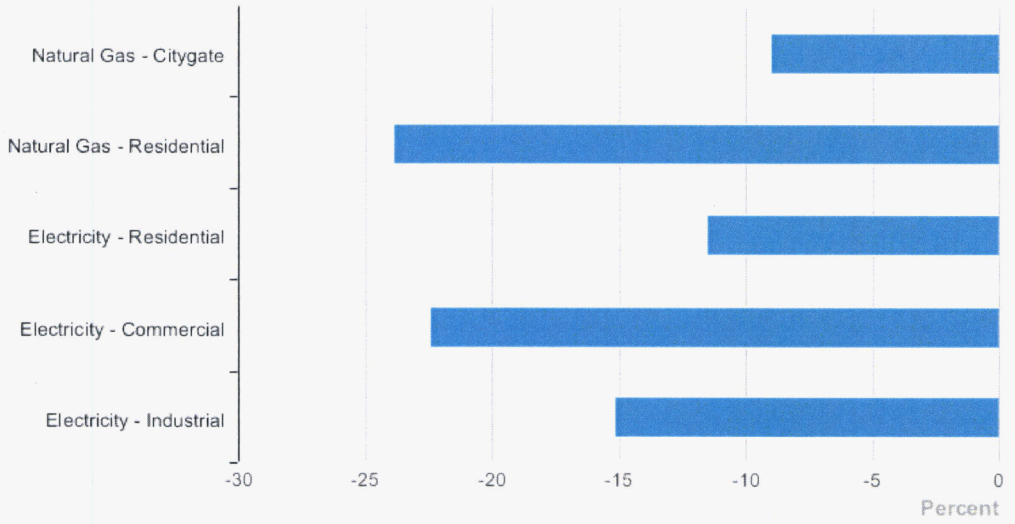
Source: Energy Information Administration, Petroleum Marketing Monthly, Natural Gas Monthly, Electric Power Monthly

New York Price Differences from U.S. Average, Most Recent Monthly



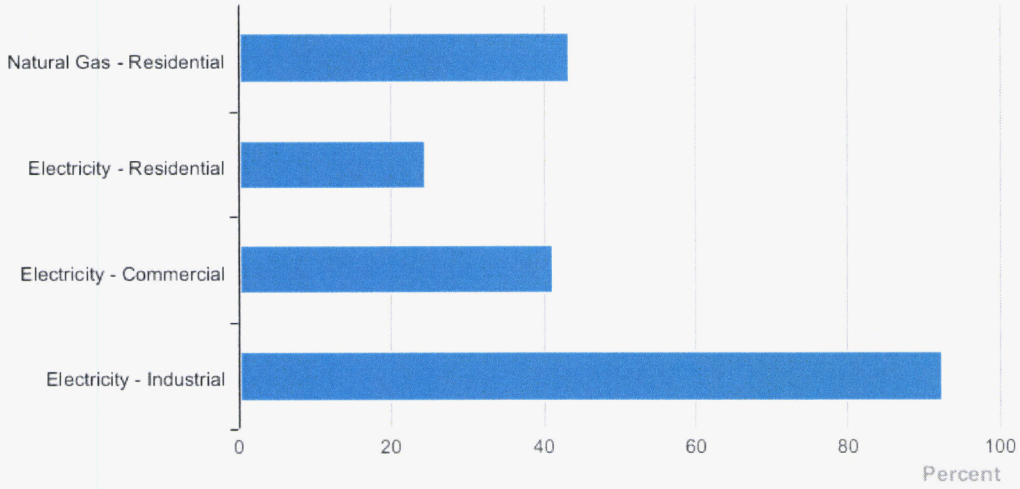
Source: Energy Information Administration, Petroleum Marketing Monthly, Natural Gas Monthly, Electric Power Monthly

Illinois Price Differences from U.S. Average, Most Recent Monthly



Source: Energy Information Administration, Petroleum Marketing Monthly, Natural Gas Monthly, Electric Power Monthly

Massachusetts Price Differences from U.S. Average, Most Recent Monthly



Source: Energy Information Administration, Petroleum Marketing Monthly, Natural Gas Monthly, Electric Power Monthly

With the end of the rate caps and the pass through of wholesale market prices in default service, more alternative suppliers have entered the retail market for residential customers. The retail market for energy services has developed a more sustained level of activity in many states in recent years, particularly with respect to electric service. The rate of residential electric customer migration and the number of active suppliers seeking residential customers has increased since 2008-2009 in most states. The statewide average for residential customer migration to alternative suppliers is approximately 20% in New York and higher with some utilities. The migration rate in Pennsylvania has increased sharply since the end of the rate cap periods in 2009 and is over 30% for some distribution utilities. While the retail market for electric service has been slower to develop in Illinois, there is an upsurge in marketing activities in the last 18 months.

Price trends for natural gas have documented a significant price reduction in the wholesale market in the last several years due to the expansion of supply and resulting lower prices associated with "fracking," a method of extracting natural gas in several U.S. locations that was not economic until recently. As a result, the level of retail migration to natural gas suppliers has lessened since default natural gas service has also reflected lower prices. However, the level of marketing by alternative natural gas suppliers remains very high in some areas.

Unfortunately, from the consumer advocate's perspective, the stability of default service and the residential customer preference for that service has been viewed as adverse to the development of a "fully" competitive market by some policymakers.

Recently, many restructuring states have entered a new phase in which the state regulatory commissions are seeking to enhance and promote a reliance on retail energy markets and either reduce or eliminate the local utility' obligation to provide default service. Whether as a response to pressure from the alternative suppliers or the theory that default service constitutes a barrier to the creation of a retail energy market, some states have embarked on policies and programs designed to change the nature of default service and "push" residential customers into the arms of the retail suppliers. These regulatory initiatives as well as the increased marketing activities by many alternative suppliers, particularly with respect to door-to-door marketing in large urban areas, have sparked the need for this Report.

IV. THE EXPERIENCE OF LOW INCOME CUSTOMERS IN THE RETAIL ENERGY MARKETS

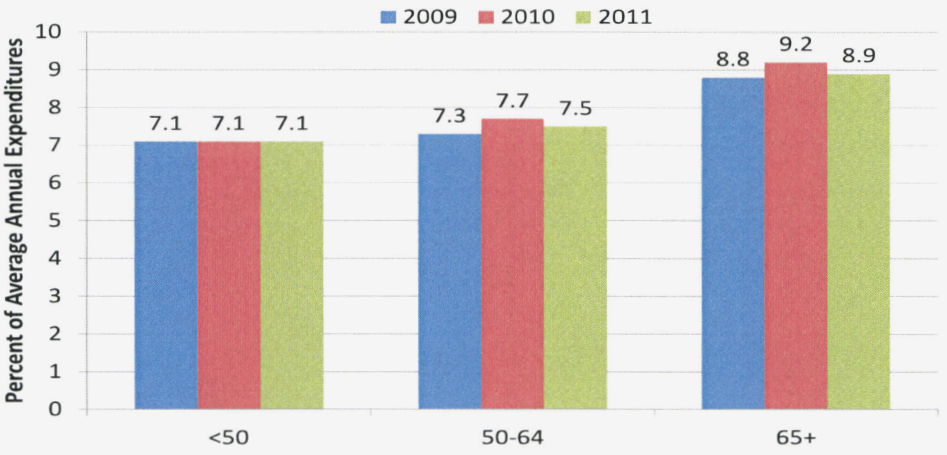
Basic electric and natural gas service are essential to almost all residential customers and the affordability of those services for low income customers whose energy burden is high in relationship to their income is crucial. The lack of affordable electricity and natural gas for home heating, refrigeration, and cooling is not the equivalent of the retail market for most other consumer goods and services, for which substitutes exist. The lack of affordable electricity or natural gas for heating and cooling has dire consequences for residential customer health and safety.[10]

A customer who enters in a retail contract with a supplier that ends up costing more than default service or more than another competitive service offer because the customer was not sufficiently knowledgeable about the pricing structure being offered or the supplier misled the customer with fine print or oral promises has not merely suffered economic loss. The customer's household experiences threats to its health and safety, particularly for those who are elderly, young, disabled, or medically frail. This concern is heightened by the ability of the supplier to use the trusted local utility to bill and collect for the contract services and fees pursuant to the now almost universally approved purchase of receivables programs, thus resulting in the ability of the utility to threaten and disconnect for nonpayment of unregulated (and potentially higher) supplier charges.

Low income families, and households with very old and very young members, are particularly vulnerable to excessive prices. It is well documented that many families face the choice between heating and eating or purchasing vital medical supplies.[11]

Older Americans who cannot afford basic energy services are particularly vulnerable to adverse health impacts due to the lack of sufficient heating or cooling:

Utility Expenditures Comprise a Higher Percentage of Average Annual Expenditures for Consumers Age 50+



Source: AARP Public Policy Institute analysis of 2009, 2010, and 2011 Consumer Expenditure Surveys.

Households who struggle to make ends meet need one thing: the lowest rates available.

Where low income customers are eligible to select an alternative supplier, do they do so? If they do select an alternative supplier, what has been the result?

These questions, although crucial to the determination of affordability for essential electricity and natural gas service, are rarely asked and answered by state regulators. In part this is due to the lack of data that would compare the prices paid by any customer, including low income customers as identified in the utility's billing system, to alternative suppliers with the prices that would have been charged during the same time period the utility for default service. This data actually exists in the utility's billing system since they bill and collect for almost all alternative suppliers, particularly for mass market residential customers, and the utilities know which customers are participating in low income programs, such as LIHEAP and the utility's own low income programs. Suppliers, meanwhile, view their billing and pricing information as confidential. However, this issue is also a reflection of the assumption by state regulators and many policymakers that retail competition is mandated and that the original promise that prices would be lower due to the actions of a competitive market is an assumed result. Finally, state regulators and some suppliers are now promoting the notion that the retail energy market has value for customers due to the wider variety of products and services that suppliers can or do offer, such as variable rates, fixed rates, green power, and various other home repair or potentially time-varying rate options and efficiency services. In other words, the value of retail energy markets is turning from the promise of lower

prices to the "value added" services and alternative pricing products that alternative suppliers may offer.

If low income customers are experiencing higher prices for electricity or natural gas from an alternative supplier compared to default service, there are other potentially adverse consequences. For example, since low income customers generally suffer disconnection notices and termination of service in a higher frequency than higher income residential customers, it may be that choosing an alternative supplier with higher prices than default service will also result in an increased volume of disconnection and other nonpayment collection actions, such as late fees, adverse credit reports, and burdensome payment plans that must be accepted to avoid disconnection and loss of electricity or natural gas supply altogether.

Unfortunately, there is a growing body of preliminary evidence that many residential customers and particularly low income customers are paying higher prices than they would have paid for default service when they select an alternative supplier. The implications of these findings have not yet been confronted or considered by state regulators.

The following data reflects studies undertaken by consumer advocates in the context of rate cases, default service proceedings, or other ongoing regulatory activities. The pattern revealed by all of these studies taken together is disturbing:

In **New York**, the Public Utility Law Project recently obtained data from Niagara Mohawk (a National Grid affiliate in upstate New York) that evaluated 8,709,449 residential customer gas and electric bills over a 24-month period. This study documented that between August 2010 and July 2012, 84 % of the residential electric bills and 92 % of the residential gas bills of those who switched to alternative suppliers were higher than the bills of those who decided to keep getting their supply from National Grid. And those statistics translated into huge disparities in consumer bills. For instance, the data showed that over that 24-month period, those with higher bills paid nearly $500 more for electricity and $260 for natural gas. In total, residential customers served by alternative suppliers paid approximately $130 million more for 24 months of service than they would have paid had they not switched to alternative supplier service and instead received full service from the traditional utility for both electricity and natural gas. This study also specifically reported data for the low income customers served by Niagara Mohawk that were identified due to their receipt of LIHEAP and/or participation in the utility discount program, estimated as 33,015 electricity and 20,840 gas customers. Low income customers who selected an alternative supplier paid a net additional cost of $13.3 million during this study period compared to default electricity rates and $5.8 million during this same period for gas service compared to default natural gas rates. Only a very small percentage of low income customers paid lower prices when served by an alternative supplier, 8.5% of electric customers and 6.6% of natural gas customers. These savings were modest over the

24-month period, averaging $40 for electricity and $63 for gas. Finally, this same analysis confirmed that customers served by alternative suppliers were sent 377,736 final termination notices due to nonpayment, averaging 31,478 per month.[12]

A similar study in **Pennsylvania** focused on PPL Electric low income customers served by electric suppliers. This analysis resulted in the same unfortunate finding—over 70% of the low income customers served by an alternative supplier were paying more than the PPL Electric default service price at the time of the evaluation. According to the information provided by PPL in discovery to a consumer advocate organization who had intervened in the proceeding, more than 73% of its low income customers enrolled in PPL's low income benefit program who were currently being served by an alternative electric supplier were charged a higher price than PPL's default service price during this period.[13]

The Citizens Utility Board in **Illinois** has published an evaluation of alternative natural gas prices charged to customers compared to utility natural gas supply service in its Gas Market Monitor. Based on an analysis of how natural gas supplier plans have actually impacted customer bills since 2003, 94% of the alternative natural gas supplier plans have resulted in higher prices for residential customers over the term of these contract terms compared to default service. The average customer loss is $1,202.00.[14] This trend has been evident for many years and for almost all suppliers.

In **Ohio**, data submitted by the Ohio Partners for Affordable Energy in two recent natural gas proceedings in which the regulatory commission has proposed to eliminate default service and auction customers off to retail suppliers also demonstrates that the bulk of competitive natural gas supplier offers are higher in price than default service provided by the natural gas utilities.[15] Data provided by Columbia Gas of Ohio shows that customers purchasing commodity natural gas from unregulated suppliers have paid over $861 million more compared to default service, which in Ohio is a pass through of short-term wholesale market prices.[16] According to this study, in the most recent six months for which data is available, Ohio customers served by marketers have paid $37 million more than what would have been charged for default natural gas service, and that figure does not include any winter heating months.[17]

The **Canadian** experience appears to reflect these evaluations in the U.S. In a 2011 Report by the Office of the Auditor General of Ontario (Canada) the Auditor evaluated the performance of the Ontario Energy Board, the key regulator for natural gas and electricity sectors.[18] As part of this evaluation, the Auditor evaluated the Ontario Energy's Board complaint handling and enforcement activities for licensed electricity suppliers. In Ontario consumers can purchase electricity from the utility at a default service price (called the Regulated Price Plan) set by the Board or purchase from a licensed supplier. Approximately 15% of

residential customers had selected an alternative supplier, primarily based on the marketing theme of "price protection and stability." Most of these supplier plans are fixed price for a 4-5 year period. The Auditor documented that the Board's customer complaints had significantly increased in recent years from 1,400 in 2006 to 4,300 in 2010 and totaled 17,000 over five years. In addition, the Auditor sampled customer bills from 2006 to 2009 from various suppliers and found that the supplier fixed price ranged from 8.49 cents per kWh to 10.53 cents per kWh but that during this same period the regulated default service price was 5.4 cents per kWh to 6.3 cents per kWh. The same of retail customers paid from 35% to 65% more for their electricity compared to the highest default service rate over the term of their contract. Over the term of a five-year contract (which was typical of the contracts entered into by residential customers) a customer using 1,000 kWh per month would pay about $2,000 more for electricity than under the regulated default service plan. This Report also noted that the suppliers avoided the normal commercial business risk of collections due to the utility's purchase of the supplier's receivables and assuming responsibility for collecting the entire bill.

The evidence above from these examples is further supported when the offers being made by alternative suppliers is compared to the current default service price on the various websites promoted by state regulatory officials as the "official" website to shop and compare offers for residential suppliers. For example, a review of the offers being made by alternative suppliers to **Connecticut** Light and Power customers revealed that the vast majority of the offers stated prices higher than the default service price listed on the website. Of the 57 supplier offers listed, only 11 show that a customer using 750 kWh would see any savings at all on a fixed price contract comparable to the standard service plan. Other offers that appear to give consumers savings are "promotional" in nature and only provide a lower price for 1-2 months, then rates would vary. The vast majority of these offers are higher than the current Standard Plan price.[19]

Finally, there is additional data that supports the adverse impacts on affordable electric and gas service for low income customers as documented in the above examples that compare prices with default service. The pattern or practice of complaints and comments from customers who have selected an alternative supplier confirm that there is widespread confusion about the prices being charged by suppliers and that the marketing conduct of some suppliers may contribute to that confusion.

- For example, the New York Commission gathered customer comments on a pending evaluation of the retail markets, asking customers to provide their individual experiences with retail suppliers. In the New York proceeding referenced earlier, the Commission received 41 public comments.[20] Many of these comments document experiences in which customers signed up with a supplier thinking that they would save money compared to their utility's default service, but later found out that their supplier rate had increased and now exceeded their utility default service

price. Many of these comments reflect experiences with "teaser" or introductory rates that are then followed by variable rate prices that end up higher than promised at the time of the sale.[21]

> Originally I signed up with a supplier in the mid 1990"s and was told at the time with the tax savings, my bill would never exceed what the utility would charge and I could have additional savings based on their purchasing electricity at a lower cost than the utility. In reviewing their costs that was true until around the turn of the century. Before then my rate bounced around the utility rate. After that point (around the Enron time) my rate was the same as the utility rate plus a 2 cent boost...."

> "We had two firm[s] for [electric] supply basically rip us off. What both did was get us in contracts and offer us pretty rates for 1 year. At the end ... the rates went ... 2-4 times higher than the NG rates and they took 3 months or more to get away from them to another supplier. Of course they offer rebates and promises just to keep holding on..."

> "It is very difficult to compare rates across ESCOs. Most do not publish rates online and require you to call a high-pressure sales line to get rates. Furthermore, their sales tactics make comparisons hard even after getting their rates. For instance, [they] may [entice] you with an introductory rate then jack up the rates after it expires and hope you don't notice."

> One customer described an ESCO contract that was charging 90 cents per therm when the utility's price decreased to 39.5 cents per therm as a result of lower wholesale natural gas prices. "I am in a losing proposition and had no clue."

> "They misrepresented their offerings and didn't give any indication that my bills would go through the roof--$150.00 in the last 4 months--$179 to $347."

> Other New York consumers described the "hard sell" and intrusive nature of door-to-door sales and repeated telemarketing calls. Several of these comments describe sales agents promising savings when the actual contract terms do not do so with variable rates that are not explained and high termination fees. Several comments state that the supplier tried to make it appear that the agent was a representative of the local utility or, in one case, the Public Service Commission. Said one consumer, "Any decision I make is based on no information; it is like buying a pig in a poke while blindfolded."

- A recent evaluation of 2011-2012 customer complaints filed against alternative suppliers with the Public Utility Commission of Ohio documented that some providers have very high levels of customer inquiry and disputes/complaints that reflect conduct that is questionable. These "red flags" are no doubt only a reflection of the tip of the iceberg in actual supplier misconduct and even a casual review of the pattern of these complaints indicates that customers are being taken advantage of with misleading information, unclear contract disclosures, supplier misconduct alleging slamming and posing as the local utility, as well as unsuccessful attempts to cancel the contract. The following summary of information is for all Ohio electric and natural gas suppliers with a total complaint/contract level in excess of 100 for the two-year period. There is no information available on the Ohio Commission's website to indicate any formal action taken or being contemplated for some of the very high complaint totals reflected in this summary.[22]

OHIO COMPLAINTS AGAINST ALTERNATIVE SUPPLIERS

OHIO ELECTRIC PROVIDER	MISLEADING INFO	SLAMMING	TOTAL
AEP Energy	2		28
AEP Ohio Commercial Retail	1	2	22
AEP Ohio Retail Energy	18	2	241
AEP Retail Energy Partners	44	11	587
(Note: 75 "cancellation issues")			
All AEP "family" total			878
Border Energy Electric Service	64	4	255
(Note: 4 "posed as utility;" and 37 "cancellation issues")			
Border Energy	186	27	1,050
(Note: 199 "cancellation issues"; 23 "posed as utility")			
All "Border" total			1,305
Commerce Energy	23	2	106
(Note: acquired by Just Energy)			
Direct Energy Services	46	3	179
(Note: 22 "cancellation issues")			
Dominion Energy Direct Sales			17
Dominion Retail	6		115
DPL Energy Resources	65	10	348
(Note: 79 "cancellation issues"; 15 "posed as utility")			
Duke Energy Retail Sales	16		238
(Note: 40 "cancellation issues;" 7 "posed as utility")			
First Energy Solutions	69	67	2,484
(Note: 351 "cancellation issues;" 100 "billing dispute")			
Interstate Gas Supply	50	4	272
(Note: 43 "cancellation issues"; 7 "posed as utility")			
NOPEC, Inc.	60		166
(Note: 61 "government aggregation")			
Verde Energy Ohio	35	5	180

OHIO GAS PROVIDER	MISLEADING INFO	SLAMMING	TOTAL
Border Energy	6		41
Commerce Energy	149	9	709
(Note: Just Energy in Ohio; 149 "cancellation issues"; 13 "posed as utility")			
Constellation Energy Gas Choice	24	4	187
Direct Energy Services	100	6	841
(Note: 131 "cancellation issues"; 9 "posed as utility")			
Dominion Retail	13	6	237
(Note: 39 "government aggregation;" 32 "cancellation issues")			
Future Now Energy	84	12	281

(Note: 48 "cancellation issues"; 12 "posed as utility")			
Integrys Energy Services	17		127
(Note: 32 "cancellation issues")			
Integrys Energy Services-Natural Gas			21
Interstate Gas Supply	64	7	772
(Note: 115 "cancellation issues"; 3 "posed as utility"; 43 "government aggregation")			
SouthStar Energy Services	6	5	226
(Note: 61 "cancellation issues")			
Vectren Retail	67	5	344
(Note: 51 "cancellation issues"; 5 "posed as utility")			

Finally, there are enforcement actions that have been undertaken by some state regulatory commissions that highlight some of the abusive practices and misleading marketing tactics that have occurred. Again, these enforcement actions, even while rare among state regulators, confirm the pattern of abusive conduct and potentially expensive supplier contracts compared to default service documented above.

- U.S. Energy Savings Corp. (now Just Energy) has been the subject for formal investigations and complaints in Illinois, Ohio, and New York. In these regulatory and civil complaint actions, this door to door marketing company that sells electricity and natural gas supply service has been accused repeatedly of misleading customers about their products will save customers money compared to the utility service, misrepresenting the nature of the utility's default service, misrepresenting the identity of the sales agent, and generally using high pressure sales tactics with low income, elderly, and non-English speaking customers.

- The Delaware Public Service Commission filed a formal complaint against Horizon Power & Light, a licensed supplier of electric service, after it received over 100 complaints alleging misrepresentation of the contract terms and deceptive sales practices. After an investigation, the Commission entered into a settlement in which the supplier agreed to relinquish its license and create a $750,000 fund that the Commission would use to recompense affected customers.[23]

- The Pennsylvania PUC recently issued a press release urging Pennsylvania residents to be "diligent when weighing offers for electricity from door-to-door and telephone solicitors. In recent days, there has been a rash of overly aggressive and dishonest sales pitches in several Pennsylvania communities." Further, the Commission stated, ""In some recent incidents, sales people have been pushing consumers into choosing high-cost electric generation services. We encourage consumers to make sure they have carefully weighed the offer,

and that they are dealing with legitimate energy suppliers before sharing account information and agreeing to switch providers."[24]

- The Maryland Public Service Commission has undertaken several formal enforcement actions against electric suppliers. In 2007 the Commission suspended the license of Ohms Energy Co. because of its failure to meet the operational and financial viability requirements in its license.[25] In 2011 the Commission ordered North American Power and Gas LLC to pay a civil penalty of $100,000 and undertake certain remedial measures to retain its license. In its Order the Commission found that the supplier implemented a multi-layer marketing system to solicit electric service customers (independent sales agents paid a commission based on their sales activities), and engaged in deceptive marketing advertisements relating to the role of the utility in selecting a supplier and the potential savings customers would receive if they changed to this supplier.[26] In 2012 the Commission ordered a $60,000 penalty against Viridian Energy Co., finding that it had engaged in false and misleading marketing practices.[27]

While there is no state sponsored analysis or comparison of supplier prices and those paid by residential customers for default service, the U.S. Department of Energy's Energy Information Administration complies data on average residential electricity prices (cents/kWh) from "restructured retail service providers" and "full service providers." This information reflects the average of the reported prices and so is not a reflection of any particular supplier or group of suppliers. While this information is not compiled for all the restructuring states, the snapshot below is relevant and also suggestive of the disturbing trends noted in the analysis from Pennsylvania, Illinois, Ohio, and New York summarized above. In the states subject to the analysis in this Report, only Illinois shows that the average supplier price is below the default service or "full service" price charged by distribution utilities. It is perhaps important to consider that two of the states with slightly lower average supplier prices compared to default service prices—Ohio and Illinois—have implemented large scale municipal aggregation programs in which bids are solicited to serve customers with the requirement that any winning bid must be below the current default service price. These prices are presented in a cents per kWh format and reflect the price of the entire bill so that all the bill calculations reflect the regulated distribution portion of the customer's bill as well as the price for generation supply service.[28]

State	Alternative Supplier	Full Service Provider
Connecticut	18.37	17.92
District of Columbia	12.91	13.44
Delaware	12.78	13.72
Illinois	11.58	11.79
Massachusetts	16.14	14.49
Maryland	13.44	13.29
Maine	15.40	14.47
Michigan	13.25	13.27
New Hampshire	14.94	16.52
New Jersey	16.30	16.23
New York	19.27	18.06
Ohio	11.04	11.57
Pennsylvania	13.33	13.24
Rhode Island	13.96	14.34

V. THE ROLE OF LIHEAP AND WAP PROGRAMS IN CUSTOMER INTERACTIONS WITH THE RETAIL ENERGY MARKETS

In reviewing the status of retail competition for electricity and natural gas service in these states, as well as the preliminary evidence about the potential adverse impacts on affordability when customers participate in these markets as documented above, it would appear reasonable to ask whether agencies that directly interact with low income customers to deliver energy assistance programs have had training or experiences relating to selecting an alternative supplier in the retail energy markets. In order to determine whether the LIHEAP and WAP delivery systems in these states are aware of issues relating to retail competition for natural gas and electricity or whether they have had interactions with their clients that either support or impact the preliminary evidence about supplier prices as compared to default service, informal conversations and interviews were conducted in these states. In each state, approximately 2-3 interviews were conducted with individuals involved in the delivery of LIHEAP and/or WAP to gather anecdotal experiences or describe training or educational outreach that is done or not done with their clients relating to retail energy markets.

Pennsylvania's LIHEAP program is implemented by Department of Public Welfare and is primarily delivered by regional state public welfare offices. A different state agency, the Department of Community and Economic Development, implements WAP; this agency contracts with the local community action program network to provide enrollment and delivery of services. Typically, WAP is coordinated with the utility funded efficiency programs that are also delivered by these agencies. The utility-funded low income CAP programs are implemented by each utility, but the utility may contract with a local community action program agency to determine eligibility. As a result, there is a distinct bifurcation between the energy assistance programs implemented by the utilities and the LIHEAP program implemented by the state welfare agency offices.

In **Illinois**, the Department of Commerce and Economic Opportunity implements LIHEAP, WAP, and PIPP. The state agency contracts with the regional community action program agencies for a coordinated delivery of these programs.

In **Massachusetts,** the Massachusetts Department of Housing and Community Development implements LIHEAP and WAP. This state agency contracts with the regional community action program agency for the unified delivery of these programs. The utilities rely on eligibility determinations for LIHEAP to trigger enrollment in the Low Income Discount programs.

In **New York**, the New York State Office of Temporary and Disability Assistance (OTDA) implements the LIHEAP program. This agency relies primarily on its regional social service agency offices to deliver this program, but local

community action agencies are also authorized to provide this program or conduct application activities.

WAP is administered by the New York State Homes and Community Renewal Department (HCR), which relies on local providers, many, but not all, of whom are part of the community action agency program network.

In addition to the LIHEAP and WAP programs, the New York State Energy Research and Development Authority (NYSERDA) implements energy efficiency and weatherization programs for residential customers, including several programs targeted to low income households. NYSERDA is a state corporation that is funded by utility ratepayer funds through a Social Benefits Fund. NYSERDA delivers its programs to contractors that submit bids pursuant to statewide solicitations. In some cases, the local community action agencies have been awarded these bids and so coordinate their delivery of the NYSERDA-funded program with WAP. Clearly, there is a wide range of state and local community-based agencies and program offices that provide energy bill payment assistance in New York and they do not necessarily coordinate the delivery of these various programs with each other.

As a result of these informal conversations, the following trends and preliminary conclusions are evident:

- In general, these agencies do not implement any specific outreach of education to their clients about the retail energy markets.
- These agencies have received anecdotal stories from their clients about offers they have received, as well as complaints and concerns about certain marketing tactics, concerns about the "truth" of some offers, and requests to provide information.
- In almost all cases, these agencies refer clients to the state regulatory agency to pursue complaints and concerns because that agency typically licenses alternative energy suppliers, but almost all indicated that they were not confident that the state agency complaint handling process was responsive to their client's concerns.
- In Illinois the most trusted organization to respond to customer complaints and issues with alternative suppliers is the Citizens Utility Board, and assistance agencies in Illinois typically refer their clients with issues or concerns to CUB. It is important to observe that the proactive outreach and complaint handling program operated by CUB is not typical of consumer advocate offices other states.
- Many agencies are frustrated with their lack of knowledge and training in this area. They are confused about the offers being promoted, as well as the ever changing identity of active suppliers and their contract offers. As a result, many have adopted a policy that affirmatively avoids getting involved in these issues with their clients.

- Many community action agencies that deliver WAP and LIHEAP would like to engage in outreach and education with their clients if they had the resources and training to do so. This desire, however, is not typical of state agencies that deliver LIHEAP or WAP, perhaps concerned that any negative comments or pursuit of complaints may be viewed as contradictory to state policy that endorses the retail energy market.
- Several local community service agencies that deliver WAP were the most interested in potentially addressing the implications of selecting an alternative energy supplier with clients because the program typically involves an analysis of the client's energy bills and a premise visit to deliver the program's services, many of which include education on energy conservation.
- None of the agencies, state or private, had the financial or personnel resources to monitor the retail energy markets and develop training materials for their intake staff even if they were inclined to take a more proactive role.
- The multiple delivery mechanisms for WAP, LIHEAP, and the state-approved bill payment assistance programs funded by distribution utilities that exists in some states complicates the ability to develop or implement any consistent outreach and education for low income consumers. The multiple delivery mechanisms for energy and other assistance programs in fact contribute to customer confusion about retail competition and indirectly assists alternative suppliers who arrive at the door to discuss a new "program" and ask to see the energy bill, thus presenting themselves as part of the assistance or official energy program network. Furthermore, when different agencies and local providers operate these programs, there is no high level oversight of the implications of the retail energy market and the impact of the potentially higher energy charges on client affordability, and certainly less of an impetus for the development of proactive education and outreach programs to deliver as part of these programs.

As a result of these informal interviews and the analysis of the program structure in each of these States, it would appear that the most significant potential for effective outreach and education to low income clients about retail energy markets exists in WAP and/or LIHEAP funded programs that include a direct home visit and discussion of home energy usage. In these visits, which may be triggered by a home energy audit and subsequent education on energy usage or the actual installation of in-home conservation and weatherization measures, the program provider typically reviews the customer's bill and historical energy usage and offers specific programs intended to reduce that usage and reduce the monthly bill. At that time, it is potentially useful and relevant to discuss the retail energy market, particularly when the program provider notes that the customer is served by a retail electricity or natural gas supplier as this information typically appears on the utility bill. As part of any discussion of home energy initiatives, providers could be trained to identify supplier charges and contract terms that result in a higher bill compared

to either the utility default service charges or the potential for lower charges from other suppliers. Unfortunately, the scope and scale of programs that rely on home visits and direct conversations with clients about the energy bill are limited and not a reasonable means of relying on widespread education and outreach to low income customers. For example, while the WAP program has delivered its weatherization and conservation services to 6 million homes since the inception of the program, the annual interaction and delivery of services is typically in the range of approximately 300,000 low income households and even this level of service delivery is entirely dependent on federal funding which can vary dramatically from year to year. Finally, this interaction typically is not ongoing, but occurs only once during the delivery of the weatherization services. In short, relying on the direct interactions that occur with WAP reflects a very small portion of the residential low income customers exposed to retail energy markets and would only be able to provide a one-time assistance in bill analysis and counseling about supplier offers available at that time.

The methodology for bill comparisons between supplier charges and utility default service exists in several bill calculator programs that appear on some utility websites. For example, National Fuel Gas Distribution Co. in New York offers a residential customer the ability to compare their alternative supplier charges with what the customer would have paid under default natural gas supply service for an historical period:

> Non-utility energy service companies, also called retail suppliers or "marketers," are able to supply natural gas at unregulated market-based prices. An individual can choose an energy supplier from among these companies or can continue to purchase natural gas from National Fuel. This historical bill comparison tool allows a New York National Fuel customer to compare the bill received for natural gas supplied by the marketer over the past 12 months to the bill that would have been received if the gas supply had been provided by National Fuel. The feature is designed only for those customers for whom National Fuel prepares the bill. If a marketer issues its own bills, a customer can contact them for the total billing amounts for applicable months.[29]

It might be possible, therefore, for LIHEAP and/or WAP providers to obtain access to these bill calculators from local utilities and offer to provide such an analysis to clients at the time of intake or delivery of in-home services and energy bill analysis.

The availability of funds to train and provide additional and up-to-date resources to LIHEAP and WAP providers is scarce. Existing administrative budgets for these programs are small and require providers to conduct their intake and counseling programs quickly and with a view to the determination of eligibility for the underlying program. While offices might make customer educational brochures and materials available to their clients in newsletters or at intake centers, such indirect educational activities typically do not have the same impact as a personal conversation and analysis of the customer's bill. Therefore, any significant

development of outreach and education about retail energy markets and the ability to actually counsel customers based on their local default service prices and supplier offers and contract terms would require additional resources.

While general fund appropriations would certainly be a legitimate source of funding for such education and outreach programs, appropriations for new initiatives are scarce and often unreliable from year to year in many states with major budgetary concerns for even basic social service programs. Another potential source of funding are the alternative energy suppliers themselves. The state regulatory commissions could possibly provide the source of such additional resources to support education and training by using its licensing and regulatory assessment funds from energy suppliers. Every state charges suppliers a licensing fee. This fee could be increased to reflect the additional expenses incurred by the agency to supervise and enforce its regulations, as well as allow for a reasonable consumer education program. These funds could be allocated in part to the low income energy assistance delivery mechanisms applicable to each state's LIHEAP and WAP program structure.

However, after these informal interviews and consultations with low income energy advocates and service providers, it is fair to conclude that most of these agencies are not engaged in outreach and education on retail energy markets and the implications of choosing an alternative energy supplier and that there is no obvious funding mechanism or program that could enable a more proactive approach.

VI. POLICY RECOMMENDATIONS FOR RETAIL MARKET ENERGY REFORMS

The purpose of this Report is not to recommend whether retail energy competition should or should not be adopted or whether retail competition for residential and small commercial customers should be repealed, although a number of states did so after adopting restructuring in the early 2000's. The Report accepts the statutory mandates that currently exist. However, it appears reasonable to identify the risks and benefits associated with the participation of low income customers in these markets and then determine if those negative aspects can be lessened and the benefits enhanced through modest reforms that can be adopted without any additional statutory authorization in most states.

The risk of higher bills if any customers selects an alternative supplier may well be understood and agreed upon in return for some aspect of the supplier's service that is not otherwise available from default service, such as higher priced "green" or renewable power or the acquisition of certain repair and maintenance or home-related services that the supplier bundles with their energy service. In theory, a customer may also prefer a variable rate contract because they assume the risk that over a reasonable period of time this rate structure would be beneficial when compared to a fixed rate default service contract that would include a premium for the rate stability inherent in such contracts. While most suppliers are not yet offering time-varying rate options to residential customers, such offers when advanced metering is fully deployed are more likely to be available and there may be some high usage customers that can benefit from lower off-peak prices if high peak usage can be shifted or avoided. All of these options assume that the consumer has the knowledge and expertise necessary to understand the contract terms, understand the pricing methodology used for default service, has some knowledge of their rights and remedies in a retail market, and that the supplier has fully disclosed their contract terms and has not employed unfair and deceptive marketing practices.

However, looking strictly at energy supply service, the impact of higher bills that may occur because the customer did not understand the pricing system offered by the supplier, was misled by the supplier, or that resulted from the lower default service price that occurred during the fixed term of the higher priced contract with the supplier, is of significant concern to lower income customers. These potential negative consequences are even more likely to occur when some suppliers target low income communities with door-to-door marketing through sales agents who are paid on a commission basis for a successful sale and are typically recruited from the unemployed seeking to increase their own income. Low income customers who are receiving taxpayer or ratepayer supported bill payment assistance, such as LIHEAP, WAP, and utility discount programs, may negate the beneficial impact of those assistance payments by selecting a supplier that ends up costing the customer more

and threatening to adversely impact the benefit of the subsidy payments, resulting in higher collection costs by the utility, the threat or reality of disconnection for nonpayment, and the health and safety impacts of unaffordable energy bills that low income families experience.

The potential response to the findings that residential customers in general and low income customers specifically are more likely to pay higher prices when selecting an alternative supplier raises a host of questions:

- How can the option of supplier promises about price stability and/or additional services be compared to default service when customers do not understand how default service is priced or how often it may change?
- Who should provide this education and how it should be delivered and who should pay for this initiative?
- While state regulators typically promote retail competition and provide shopping guidelines, as well as sponsor websites that allow customers to compare prices between default service and alternative suppliers, this information is not generally available where low income households live and work and may not respond to the primary language spoken in these households. How can information that is available be delivered and understood by those who need it?
- How can funding be assured to undertake more comprehensive and targeted education to residential customers generally and low income customers in particular?
- Are existing consumer protection regulations sufficiently robust and detailed enough to prohibit certain types of conduct and more closely regulate the door-to-door marketing and telemarketing sales channels that often are the source of the largest volume of complaints and enforcement activities to date?
- Should state regulatory agencies that license alternative suppliers upgrade their enforcement of these regulations with additional oversight and allocation of resources? While state regulatory agencies that traditionally supervise monopoly utilities have been given the obligation and duty to supervise and regulate competitive energy suppliers, many of these agencies have not obtained the necessary training and resources to develop consumer protection policies for competitive industries and monitor and enforce those requirements, skills that are not naturally related to the regulatory duties of most utility regulators.[30]
- Should low income customers participating in state and federally funded assistance programs be allowed to select an alternative supplier and, if so, with what conditions or protections?

With regard to low income customer participation in the retail energy markets, there is a concern that even asking this question is viewed as "anti-competition," "overly protective," and even a suggestion that such a prohibition would be "discriminatory" and "paternalistic." However, if the motivation for such a proposal is a reflection of the potential adverse impact on taxpayer and ratepayer funded subsidies, the adverse health impacts associated with lack of essential energy services, and the growing evidence that customers are making choices that are detrimental to their own interest due at least in part to marketing and supplier conduct that is improper, the proposal assumes a greater legitimacy.

The need to address whether or how low income customers are treated in the retail energy markets is important not only from the perspective of the customer's obligation to pay the total bill to avoid disconnection of service, but the impact of higher supply prices on the funding for the low income program itself. If the program requires the customer to pay a fixed amount each month and that fixed amount is based on a calculation of an energy burden that reflects default service prices (i.e., based on the total bill), the risk is that ratepayers will be required to fund the difference between the fixed payment based on default service charges and the higher price that the alternative supplier may charge. If the credit is fixed and the customer is required to pay a levelized bill payment each month to cover both the distribution and default services included in the total bill, it is not possible to assure an affordable bill if the customer selects an alternative supplier that causes the generation portion of the bill to increase.

In light of the findings presented in this Report and consideration of the policy implications identified above, the following recommendations should be considered by state regulators to improve the potential for low income customers to benefit from the retail energy markets:

State regulators should take a more proactive role in monitoring retail energy markets and determine whether customers, particularly low income customers, are paying more to some or all suppliers compared to default service.

No state regulatory authority has made publicly available the type of analysis to evaluate the prices charged by retail suppliers such as that conducted by some advocates in Illinois, Ohio, New York, and Pennsylvania. Instead, state regulators continue to promote the theoretical benefits associated with retail competition, including potential savings, increased value of service, and the ability to obtain innovative services, as opposed to focusing on education about how to shop and compare prices and avoid being gouged. Even though the statutory mandate requires that retail energy competition be implemented, state regulators should assume the duty and responsibility for determining what is actually occurring in these markets for their most vulnerable consumers. Such analysis and reporting is readily available either directly from the suppliers themselves in the form of actual billing data submitted to the utilities or from the utilities who undertake to issue

bills for most suppliers for residential customers. This type of analysis should be made publicly available, although the identity of individual suppliers could be withheld. This information is vital to customers and should help craft educational messages. For example, state agencies should not promote the concept of saving money on the electric or gas bill if in fact the vast majority of suppliers are charging more than default service. It is also important to compare supplier prices with the marketing messages provided to customers, respond to customer complaints, and consider the initiation of formal and informal enforcement actions.

States should prohibit low income customers participating in utility and federally sponsored assistance programs from selecting an alternative supplier unless there is a guarantee of savings compared to default service.

If all or even most energy suppliers offered contract options that ensured a price lower than default service over a reasonable period of time, this reform would not be needed.

While prohibiting low income customers from entering the retail energy markets appears discriminatory,[31] it is reasonable to recommend that affirmative steps be undertaken to ensure that either low income customers remain under default service or that there is a formal program implemented to ensure that alternative suppliers that serve such customers will provide a benefit in the form of a lower price. There are a variety of options to achieve this result that would benefit low income customers, ensure the most effective use of limited assistance program funds, and still ensure the implementation of retail market opportunities for such customers.

First, it is possible to propose that low income customers who participate in LIHEAP, WAP, and utility sponsored bill payment assistance programs not be allowed to enter the retail energy market. Such an approach would require the distribution utility to reject any enrollment of such customers submitted by alternative suppliers. This is the more dramatic option but has been implemented in Ohio and in Pennsylvania until recently. The current Illinois approach which does not prevent low income customers from enrolling with alternative suppliers but, upon doing so, results in the customer's elimination from the Percentage of Income bill payment program administered by the LIHEAP agencies, should not be adopted.

Second, it would be possible for the agency that implements LIHEAP or the utility itself to aggregate low income customers participating in utility and federally funded programs and seek competitive bids from retail suppliers to provide service to these customers with the requirement that an acceptable bid must provide a price lower than default service over the term of the contract. It is for this reason that in Ohio the agency that implements a Percentage of Income Payment Plan prohibits its participating customers from selecting an alternative supplier and implements that policy by requiring utilities to deny enrollment of such customers if a supplier attends to enroll such customers. In addition, Ohio has conducted a

separate competitive bid opportunity to serve such customers from alternative suppliers with a bid requirement that this service must result in lower prices than the otherwise applicable default service price. This approach, which has been implemented when the bid results would ensure a savings, has the benefit of allowing such customers to participate in the retail market when it is in the interest of both the customers and all ratepayers to do so.

Third, in the pending investigation of retail energy markets by the New York Public Service Commission, the Commission specifically asked the parties to discuss the advantages and disadvantages of allowing low income customers identified in the utility's billing system to participate in the retail market. AARP and the Pennsylvania Utility Law Project responded as follows:

> First, the Commission should consider at least a temporary moratorium on allowing low income customers who have received LIHEAP in the last year or that are enrolled in the utility's low income programs to enroll in any ESCO program while this investigation is pending.
>
> Second, low-income customers generally need the lowest price commodity service. It is unreasonable for this Commission to approve discounts and reduced rates for low income customer classes, shift responsibility for the foregone revenue to all other customers, but then allow ESCOs to charge higher rates that result in unaffordable or higher bills, thus contributing to the higher collection costs to all customers and adverse health and safety impacts on the low income households. An assurance that low-income customers would not pay more if they switch to an ESCO would help ensure that the intended benefits of LIHEAP and low income rates actually have the intended effect of reducing energy burdens.

This recommendation effectively proposes that the commission's regulations should impose a duty on any licensed alternative supplier who accepts a low income customer (as identified in the utility's billing system as receiving LIHEAP or participating in the utility's low income assistance program) must provide a service that will result in a lower price than charged by the utility. Suppliers in most cases will not be able to identify low income customers participating in these programs in advance of solicitation and submission of an electronic enrollment request to the distribution utility. However, PECO Energy in Pennsylvania has formally proposed a method by which such an approach could be implemented.

In response to the Pennsylvania Commission's order that the utility devise a program to allow low income customers to participation in the retail electricity market, PECO Energy[32] has proposed that its low income program customers be allowed to select a supplier that PECO has certified as offering a price product that will result in lower prices compared to its default service price. PECO Energy's low income program serves 140,000 residential customers (9% of all electric customers), the largest low income program in Pennsylvania. The program is

structured as a tiered discount that is designed to provide the largest discount to those with the lowest household income. The discount ranges from 27% to 93%. This program resulted in a $75 million rider in 2012 paid by other residential customers.[33] The shopping plan proposes that customers who select an alternative supplier will have the discount applied to the supplier charges instead of PECO's default service rate, but that participating suppliers must agree to charge a rate that is at or below the default service for residential customers. This approach will avoid the imposition of higher program costs on other customers. Suppliers who charge an early termination fee will be required to collect such a fee, if triggered by early termination, outside of the normal utility billing and collection process. Participating suppliers must agree to publish their offerings to customers enrolled in PECO's low income program and in customer mailings done by PECO.

In light of the precedent established by the Ohio aggregation program and the proposal by PECO Energy in Pennsylvania, states should consider a formal analysis of low income participation in retail energy markets and adopt proactive programs to ensure that such customers will see benefits in the form of lower prices or prohibit low income customer enrollment with retail suppliers.

While any of these options might prevent low income customers from selecting a "green" electric option marketed by an alternative supplier, such an option should be considered in light of the ratepayer and taxpayer subsidies currently provided to such customers that are intended to result in more affordable bills. Furthermore, most restructuring states, including Massachusetts, Ohio, Illinois, and New York, already have a mandate for a certain percentage of renewable resources that must be reflected in generation supply provided to all customers, including default service customers.[34] As a result, energy prices already reflect this subsidy and are reflected in prices paid by all customers.

LIHEAP and WAP agencies should consider the implementation of educational program about retail energy markets to their clients.

Based on the informal interviews conducted with LIHEAP and WAP agency personnel as part of this Report, it is fair to ask whether such agencies should consider taking on a more proactive approach to educating their clients about the retail energy market. These agencies directly interact with low income households at the time of application for LIHEAP and WAP, and, with WAP, at the time of the delivery of the benefits at the residence. Furthermore, many of these agencies offer counseling and other services that arise in the context of bill payment and collection issues, particularly if the customer seeks supplemental or crisis funding when faced with a disconnection notice. Therefore, it would be efficient and relevant for these agencies to proactively initiate a discussion of a customer's selection of an alternative supplier, offer to assist the customer in comparing offers, educate the customer about their rights generally at the time of delivery of these services that are directly related to the payment of the energy bill.

Of course, this type of outreach and education and counseling is time consuming and certainly requires additional resources and funding that is in short supply for these agencies, particularly with the dramatic reduction in federal LIHEAP and WAP funding compared to the recent past. Under federal LIHEAP and WAP regulations, only 10% of the federal grant to each state can be used for administration of the program. This funding must support not only the state oversight of the program, but the actual delivery of the program that occurs in most states through the regional state agencies or community action program network. It is unrealistic to suggest that this funding stream is sufficient to add this important and potentially time-consuming matter to client intake and counseling associated with these programs.

Therefore, it is not practical to suggest this approach without the identification of additional funding to implement such a program. There are a variety of potential funding options, including additional federal funds appropriated for this purpose as a part of the federal grant, a direct state level appropriation for this purpose, the redirection of current state commission educational funds (which are not sufficient in most cases for general customer education), or the adoption of a surcharge or licensing fee imposed on alternative suppliers that is redirected to the LIHEAP and WAP agencies for an approved educational and outreach program.

Any and all of these options should be considered and explored by the low income client support network at the state and federal level. Until or unless there is either a dramatic change in the statutory obligation to implement retail energy markets or a program rule is adopted that shields low income customers enrolled in these assistance programs from entering into contracts that would increase their bills, it is reasonable to seek additional means to reach and educate these customers as well as tighten and enforce consumer protection programs applicable to suppliers.

States should continue to support and implement a Default Service policy that reflects a prudent mix of wholesale market contracts and ensures price stability for residential customers.

A primary obligation of the regulatory commission, made even more important in light of the evidence reflected in this Report concerning the higher bill impacts associated with selecting an alternative supplier, should be to ensure that the default service pricing methodology and presentation is a reflection of a diverse mix of wholesale market contracts designed to provide the least cost over a reasonable period of time. Customers should not be pushed into the retail market be redesigning the current portfolio approach into a more volatile and higher priced service. Furthermore, it is also fair to ensure to that the default service price is disclosed on the customer's monthly bill as a fixed rate and that is not subject to significant reconciliation and adders that make a reasonable comparison with supplier prices impossible.

States should not adopt "retail market enhancement" programs designed to promote customer switching to alternative suppliers with a guarantee of savings to participating customers and other important consumer protections.

In light of the findings documented in this Report and the growing level of customer complaints relating to energy marketers and suppliers, it may not be appropriate to adopt programs that are designed to require distribution utilities to push customers into the arms of suppliers. These programs, such as that proposed in Pennsylvania, to conduct opt-in auctions or customer referral programs and to adopt more volatile default service pricing policies, may have the unintended consequences of causing residential customers generally and low income customers specifically to experience higher bills for essential electricity and natural gas service. At a minimum, any such programs should include important consumer protections. As a primary recommendation, these programs should allow the customer to volunteer to participate in any such programs, offer a guarantee that the supplier price will be lower than the default service rate over the period of the program, and require the customer to affirmatively agree to any terms offered by the supplier to remain its customer at the end of the program.

State regulators should adopt reforms for the disclosures of price and material contract terms offered by alternative suppliers.

The states that are the subject of this Report (and others with retail energy markets) typically require licensed suppliers to prominently disclose in writing the price of the proposed contract at the time of the sale to the customer. This requirement works relatively well when the supplier is offering a fixed price contract for a certain term. In those cases, the supplier states the cents per kWh or cents per therm in its advertising and contract documents. However, when a supplier offers different pricing methods, there is a significant gap in disclosure requirements and the potential for customer confusion is significant.

For example, a supplier may offer a "percent off" the default service price in its promotional materials and not state the actual kwh or per them price. This raises the issue of whether the discount rate is fixed or variable or whether this discount will be guaranteed over the term of the contract or will change based on the changes in the underlying default service rate.

Some suppliers charge a kWh or per therm price plus a fixed monthly fee or other recurring or non-recurring charges for services that utilities do not impose on their customers. If a fixed monthly fee is required in addition to the per kWh or per therm price, the actual price that is charged to the customer will be different than the prominently promoted cents per kWh or cents per therm price that appears on the front of the contract or in the advertising materials.

Another typical supplier rate offer is a promotional price that only remains in effect for a short-term prior time (2-3 months), followed by a price that may be variable or fixed, but which is not fully explained in the marketing materials.

More typical is the variable rate contract. Under this type of contract, the supplier may or may not state an initial price, but does state that the price will vary. Some of the disclosures concerning how this price will vary range from a vague reference to "wholesale market prices" to a natural gas indexed rate based on publicly available wholesale market prices.

Finally, it is typical that supplier rates are summarized on Commission-sponsored "shopping" websites with a link to the supplier's website for more details. However, many suppliers do not provide their prices and terms and conditions on their own websites unless the customer initiates the application process. As a result, it is not possible to really shop and compare prices and the details about the pricing methodology on publicly available websites. This is particularly the case with variable rate offers so that the methodology for establishing the variable rate is not publicly disclosed.

As a result of these pricing options, the state commission should adopt more detailed regulations about price disclosure. The Commission should require suppliers to disclose their price in a uniform manner as part of their marketing materials and terms of service documents. This recommendation is not intended to regulate the pricing method that suppliers choose to use or regulate their underlying pricing decisions. Rather, the recommendation would require that a true "apples to apples" comparison of prices be enabled by requiring suppliers to include all fixed and recurring charges, such a minimum monthly charges or other unavoidable fees[35], in the cents per therm or cents per kWh price that is presented to customers and listed in any Commission-sponsored website.

This proposal is quite similar to the requirement under the Truth in Lending Act that creditors disclose the Annual Percentage Rate (APR) for all credit transactions in a uniform and "regulated" manner to allow customer comparisons of interest rates. The interest rate on the note or mortgage document does not necessarily tell the whole story if the creditor charges upfront fees or "points" that have the impact of raising the actual impact of the interest charges. As a result, all creditors must calculate their advertised and disclosed interest rate pursuant to regulations that define what is and what is not included in the APR. The same approach should be applicable to energy prices that may appear to be fixed and lower than the default service price (or lower when compared to other suppliers) but in fact result in higher prices due to a minimum monthly charge or other fee that is disguised or not otherwise included in the cents per kWh or cents per therm that is prominently advertised or orally presented to customers at the point of sale. A separate disclosure of such fees does not solve this concern because consumers cannot rely on a single price to compare to other supplier offers or the default service price.

The way in which such charges can be included is to require suppliers that seek to include such charges in their customer contracts to calculate and disclose the effective energy price based on common usage levels for residential customers, for example, 500 kWh, 1,000 kWh, and 1,500 kWh. The effect of the cents per kWh and the monthly fee will result in a higher kWh charge than the advertised rate and be clearly visible to customers in this manner. For example, if the supplier is offering to charge 8 cents per kWh but also includes a $10 monthly fee that is included in the fine print of the contract, the actual disclosure should be as follows:

- 500 kWh X $.08 + $10.00 = $50. The actual kWh rate is $50 / 500 kWh or $.10/kWh.
- 1,000 kWh X $.08 + $10.00 = $90.00. The actual kWh rate is $90 / 1,000 kWh or $.09/kWh.
- 1,500 kWh X $.08 + $10.00 = $130.00. The actual kWh rate is $130 / 1,500 kWh or $.087/kWh.

This example shows the well-known phenomenon that fixed monthly charges have a larger impact on lower customer usage profiles compared to higher customer usage profiles. Nonetheless, if suppliers are going to be able to charge fixed monthly fees in addition to the "nominal" energy charge, the above required disclosure will be a valuable and needed shopping tool and will have benefits in particular for lower usage customers when comparing prices.

The disclosures required for variable rate energy contracts are among the most vexing issues facing state regulators. The concern is that the customer may be informed that the price will vary, but the disclosures concerning the manner or range within which the price will vary is often obscure or deliberately hidden in fine print. Some of these variable rate disclosures are incomprehensible and allow the supplier to make changes in the customer's rates without any reference to a published or external index that is not in the control of the supplier. For example, two examples from Ohio are typical:

- Cincinnati Bell Energy is listed in the Duke Energy "apples to apples" chart as offering a variable month-to-month price at $0.06150 per kWh. The terms and conditions available on this supplier's website states, "Under CBE's variable price plan, your price may fluctuate from month to month based on wholesale market conditions applicable to the Distribution Company's service territory."[36] This "disclosure" is not specific and does not even state what aspect of the "wholesale market" might be used to change the customer's price. Nor is there any minimum or maximum price change identified as controlling this variability in price.

- Energy Plus also offers a variable rate to Duke Energy customers. Its website states, "In a variable-rate model, your supply rate is based on a variety of factors including our costs to purchase energy, applicable taxes, fees, charges,

costs, expenses and margins and can change each month. As with many variable supply rate products, the supply rate may be different, including higher, than the supply rate charged by your local utility company. Because you can cancel at any time without a cancellation fee, you can evaluate your plan each month to determine whether it's working for you."[37] Again, there is no specific information disclosed concerning the basis for changes to the variable rate other than supplier discretion and the manipulation of the rate to assure "expenses and margin (another word for "profit")."

Variable rate contract disclosures should inform the customer of an example of how the price of their contract would have changed in the past 12-24 months if the contract had been in place with the methodology included in the supplier's contract. Obviously, there should not be any promise that historical changes in the index or methodology will guarantee future price changes, but at least the customer will understand the nature of the variability to which he or she has agreed and see the range of change in price that has occurred in the recent past. Such a disclosure is required, for example, for variable rate mortgages under the Truth in Lending Act.[38]

Most importantly, variable rate contracts should be required to identify the specific index, formula, or methodology that is external to the supplier's own manipulation or discretion to govern their terms. It is unreasonable and unfair for residential customers to be exposed to a monthly change in price for essential electricity or natural gas service based on an unidentified or unknown methodology. Whatever the methodology, index, or formula used by the supplier, it should be publicly available and external to the supplier's ability to manipulate or interpret the index, formula, or methodology. This reform, coupled with the proposed disclosure requirement that the customer be presented with how that index, formula, or methodology has changed the underlying electricity or natural gas price in the past 12-24 months, will allow customers to make a rational and informed decision about whether a variable rate contract is appropriate for their needs. These disclosures are also crucial for residential customers to understand the nature of variable rate contracts for electricity and natural gas service, a phenomenon that is not typical for these utility services or, where allowed for default service, is implemented by a methodology that is fully vetted and supervised by state regulators that involves a predetermined index or formula for establishing these price changes.

States should adopt tougher restrictions on Door-to-Door and Telemarketing sales activities.

There are several reasons why door-to-door sales and telemarketing gives rise to the potential for abusive and deceptive marketing. First, the salesperson is typically not an employee of the supplier, but an independent agent compensated based on a successful sale and so has the natural incentive to use strong sales techniques to achieve this objective. Second, the customer is marketed with oral statements and information that may and, based on evidence, often is contradicted

by the large and small print of the actual contract. These oral representations are not recorded, but customers rely on those statements and often view the recorded verification statements as a formality. While the written agreement may not promise savings, the oral representations and statements by the salesperson may be designed to imply or promise such a result. Third, the customer is typically not as knowledgeable about competitive energy markets, the role of the utility and its default service, and is often misled, either deliberately or not, that the person at the door has some "official" status, either from the utility or a government agency. This is particularly the case in lower income neighborhoods where utility workers frequently conduct premise visits for disconnection, reconnection, and gas safety inspections. Furthermore, customers are sometimes informed that they "must" choose or that their "window" to make a decision is closing, implying or deliberately misleading the customer into thinking that the utility's role in supplying power supply is temporary or about to end. Finally, door to door marketers often target lower income, elderly, non-English speaking, or disabled or frail individuals as a result of the neighborhoods that are targeted for this type of marketing and/or the fact that these are the folks who are home during the hours typical for door to door marketing activities.

Because most customer complaints about energy marketers reflect door to door and telemarketing sales, state regulators should adopt a more detailed set of regulations. Appendix B contains a minimum list of best practices, many of which were adopted recently by the Pennsylvania Commission.

States should adopt stricter regulation of certain contract terms, particularly dealing with contract renewals and early termination fees.

Many supplier contracts contain an early termination fee. These fees are attached to fixed price, variable price, as well as fixed term and month-to-month contracts. These fees can be very large if not otherwise prohibited. A proceeding in Illinois documented early termination fees of $500 or more prior to the adoption of the statutory reform. More recent fees being charged in other states that have not sought to regulate or prohibit such fees range from $100 to $150.

The Illinois consumer protection reforms for natural gas suppliers include a statutory prohibition for an early termination fee of more than $50. This is a reasonable approach that should be adopted elsewhere. Furthermore, there is no reasonable justification for including an early termination fee in month-to-month or variable rate contracts even if for a longer contract term. If the supplier is charging a monthly variable rate, the supplier bears little or no risk if the customer cancels since the generation supply or natural gas supply service is likely to be purchased by the supplier on a short-term basis in the wholesale market.

Another important contract term that should be the focus of consumer protection regulations is the issue is how or whether a supplier can interpret a customer's silence as agreement to changed terms or a renewal of an expiring

contract. In general, the regulations should lean toward ensuring that affirmative customer consent is required to make a "material" change in terms of an existing contract, whether or not the original contract contained a term that allows such changes without customer consent. The term "material" should be defined at a minimum as a change in the pricing terms. First, it is unreasonable to allow suppliers to change the terms of an existing contract when that term affects the customer's price or fees and charges without affirmative customer consent. Second, when a supplier's contract has reached the end of its stated term, the regulations should require the supplier to obtain a customer's affirmative consent to a renewal of any contract that also seeks to change the original price or related fees and charges.

Renewal of an existing contract should be allowed to occur without affirmative customer consent only if the underlying terms and price do not change or if the renewal is limited to a month-to-month contract with the original terms and no termination fee. A supplier should not be able to change a fixed price contract into a variable price contract nor alter the fixed rate without obtaining affirmative customer consent.

The basis for these proposals with regard to renewal and change of contract terms is that customers who leave the utility and agree to be served by a supplier have agreed to a certain "bargain" and have affirmatively provided evidence of such agreement in the verification process. The supplier should not be able to interpret this initial agreement to allow the supplier to change the basis of this bargain without also assuring affirmative customer consent. An agreement to become a customer is not an agreement to allow the supplier to make changes that are material to the bargain based on customer silence.

States should adopt a more robust oversight and enforcement program for alternative suppliers.

Most state utility regulators do not have sufficient or fully trained staff to undertake the obligations associated with the oversight and enforcement of a competitive market. This is not a criticism, but a reflection of the nature of utility regulation that has developed in monopoly markets and the type of skills that are needed and sought for that type of market and price regulation. However, with the onset of more mature retail energy markets and the clear indication that there are abusive conduct occurring in these markets, state regulatory commission should significantly upgrade their resources associated with the oversight and enforcement activities needed to ensure that the promised consumer protections are delivered and the licensing process is something other than a "paper" exercise. Specifically, state regulatory commissions should be prepared to implement the following initiatives:

A. **Licensing/Certification.** The intent of the certification process should be to ensure that the supplier has the necessary managerial, financial, and technical expertise to allow it to market to residential customers and enforce its contract terms. However, the purpose of this process is not only to require the supplier to check off certain boxes, file required forms, and submit a modest security or retainer. It is vital that the state regulatory commission act as a gatekeeper to prevent suppliers that have a history of investigations and adverse activities in other states from obtaining a license. While most commissions are reluctant to prevent suppliers from entering the competitive market, fearing that they will be viewed as adverse to the creation of a retail market, the fact remains that the certification and licensing process must be viewed with a serious intent to prevent "bad actors" or those without sufficient resources and expertise from entering the retail market. The failure to undertake this duty in a proactive manner risks serious harm to consumers and the potential that the commission will need to undertake expensive and time consuming activities to remove the offending supplier from the market and make consumers whole, a result that unfortunately rarely occurs without economic loss to consumers. As a result, the state commission should ensure that its certification review process keeps pace with the surge in supplier activities in other states and carefully reviews the background and qualifications of not only the corporate entity that has applied, but the background and experiences of key directors and managers in other retail market entities in other states.

B. **Disclosures.** In a competitive market the role of disclosures is the crucial substitute for regulation of prices and terms of service. This hallmark of consumer protection regulation has been recognized in state and federal consumer credit transactions (e.g., Truth in Lending Act), and in numerous retail consumer sales transactions (e.g., the sale of used cars, personal insurance). The same criteria that led to those typical disclosure laws and regulations are applicable to the retail sale of electricity and natural gas supply. Energy suppliers are in the business of making a sale to earn a profit and are motivated to maximize that profit. Residential and small commercial customers who are used to standard utility prices and terms and conditions that cannot be changed on a whim are ill equipped to understand and compare the many pricing and contract term options offered by the suppliers. While the cents per therm or the cents per kWh may be the focal point of most educational activity and a component of the supplier's marketing materials, there are other key components relating to the price and other terms and conditions that can and do have a significant impact on the customer's bill and the cost of energy services. The applicable regulations should reflect the need for disclosures that reflect all fixed, variable, and recurring charges in a uniform manner that allows for reasonable comparisons and educational messages. Further, other contract terms must be highlighted, such as non-recurring fees (deposits, late fees, early termination fees) in a manner that allows the prospective customer to compare the essential contract terms among suppliers. This type of regulatory tool is particularly important for supervision of door to door sales and telemarketing

sales of energy supply because the customer is naturally incented to rely on the salesperson's statements about the contract terms as opposed to the written contract terms that may contain fine print and that the salesperson may deliberately fail to orally disclose. There is a potential for adverse impact given the disparity between the written contract terms and the oral representations and sales messages when a transaction is conducted in person or over the phone.

C. **Regulation of Contract Terms**. While typically not widely understood, the regulation and potential prohibition of certain contract terms and marketer conduct is an essential tool for the regulation of a competitive market. For example, the Truth in Lending Act (and many similar state consumer credit protection laws), Fair Credit Reporting Act and the Fair Debt Collection Practices Act all prohibit certain conduct and contract terms that are viewed as unconscionable or unfair, even if accompanied by disclosure. This type of regulation is particularly important for the retail energy market due to the significant need for affordable energy services and the implications for health and safety if these services are not available at a reasonable price and reasonable terms. The state's retail regulation of energy markets confronts the need for this approach when dealing with the regulation of variable rate contract terms, contract renewal policies, early termination fees, and other terms that may tilt the bargain so far into the supplier's favor that they should be deemed unreasonable and prohibited. Another area in which such regulation is typical relates to the oversight of door-to-door and telemarketing activities by suppliers.

D. **Customer Education**. The regulatory commission's promotion of the retail energy markets and any associated website should more carefully refrain from suggesting that the selection of an alternative supplier comes with the assumption that the customer will "save money," or "lower your energy bill." The commission's educational materials should emphasize the range of options available from alternative suppliers and clear indicate that not all options are likely to result in bill savings, but may have other benefits depending on the customer's preferences. Most importantly, these educational materials and websites should require suppliers to provide a full disclosure of the price and other material terms to any member of the public as a condition of appearing on the website, including that when variable rates are offered, how such prices are calculated and an historical presentation of price changes under the supplier's methodology. The commission should emphasize in its outreach and education how customer can compare prices with their current default service rate structure and promote the use of bill calculators.

E. **Enforcement.** State regulatory commissions have an obligation to seek and actually implement the enforcement tools necessary for proper supervision of a retail market. In general, based on the information documented in this Report, state regulatory commissions should generally take a more proactive and resource intensive oversight and enforcement role with regard to supplier marketing and

contract behaviors. Among the enforcement remedies that the state commission should seek statutory authority to implement include:

- The authority to adopt orders requiring adherence to marketing standards as a condition of eligibility to market electricity and gas;
- The authority to reject, suspend, and rescind a license for violation of the regulations and licensing conditions;
- The authority to require suppliers to submit a reasonable bond or other financial instrument to be available to the commission upon a finding of violations and the return of any funds held for the benefit of customers;
- The authority to order suppliers to provide restitution to customers where misleading and unlawful behavior has occurred;
- The authority to order a supplier to halt the use of a particular marketing channel or activity when preliminary evidence suggests that such a suspension is warranted while a more formal investigation is completed, similar to a civil injunction to halt unlawful activity pending resolution of a formal complaint;
- The authority to assess civil penalties for violation of orders or regulation through an expedited administrative process; and
- The authority to assess licensing fees on suppliers that reflect the heightened level of supervision, education, and enforcement that has arisen in the implementation of retail energy competition.

APPENDIX A: SUMMARY OF CURRENT DEVELOPMENTS ON RETAIL MARKETS IN SELECTED STATES

Pennsylvania

Pennsylvania adopted retail electric restructuring in 1996 and natural gas retail competition in 1999.[39] The electric restructuring law established rate caps for generation supply service until certain transition charges were eliminated from rates. Subsequently, extensions of rate caps were negotiated in a variety of merger and rate case proceedings so that the largest electric utilities operated with rate caps for default service until 2009-2010.

In 2008, prior to the expiration of electric rate caps for most Pennsylvania utilities and in response to reports of higher bill increases in default service in other states, Pennsylvania adopted reforms to its restructuring law: House Bill 2200 (Act 129) established new policies to govern default service. The default service provider (distribution utility) must submit a plan to acquire generation supply by competitive means to obtain "generation supply at the least cost" and obtain a "prudent mix of contracts to obtain least cost on a long-term, short-term and spot market basis..." Long term is defined as between 4 and 20 years. The statute specifically allows bilateral contracts and long-term contracts, as well as other short and medium contract terms. The original statutory obligation to acquire default service at "prevailing market prices" was repealed and widely interpreted to prevent any move to relying solely on short-term and more volatile wholesale market contracts. The new law also endorses a variety of competitive acquisition approaches, including auctions, requests for proposals, and bilateral agreements.

The utility must submit a procurement plan for review and approval by the Commission. Most procurement plans for 2009-2013 were negotiated for each utility that includes laddered fixed price full requirements wholesale market contracts and some purchase of spot market blocks of energy for a small portion of the load. The initial plans typically addressed purchases for laddered contracts of various lengths for a three-year period.

The Price to Compare or default service must be a fixed rate and appear on the customer's bill. This PTC includes the generation charge (the pass through of the wholesale contracts), the transmission charge, and the surcharge for renewable energy mandates. The PTC is reconciled and changes on a quarterly basis for residential customers.

The Office of Consumer Advocate publishes a monthly database on its website that compares offers by alternative suppliers for residential customers with each utility's default service price for both natural gas and electricity service.[40] In

addition, the OCA publishes shopping or migration statistics for each natural gas and electric distribution utility that are updated at least quarterly.[41]

As of January 2013, residential electric customer migration rates varied from a low of 0% for UGI (a small electric utility) to a high of 43.5% for Duquesne Light, which serves the Pittsburgh, PA area. The typical rate is 29.5% for PECO Energy (Philadelphia), 42.2% for PPL Electric, and approximately 25% for the FirstEnergy utilities (West Penn Power, Penelec, MetEd, and Penn Power). This is a significant change from 2009 when the rate caps began to be eliminated for the larger distribution utilities and residential customer migration rates were below 10% for most Pennsylvania utilities.

As of April 2013, alternative natural gas suppliers served 11.58% of residential customers. However, this statewide average masks the higher migration rate for some natural gas distribution utilities where migration rates in excess of 20% are typical. This migration rate has gradually increased from 7% in April 2010.

The Pennsylvania Commission has promoted the development of retail markets with consumer education initiatives. The Commission-sponsored website, PaPowerSwitch, tells consumers, "Help someone you know save money on their electric bill or find electric services that fit their needs." And, "You may be able to save money by switching electric suppliers."[42] Consumers are advised to ask the following questions of a supplier when considering offers:

> As you shop for electricity, be ready to ask competing suppliers the following questions:
>
> - Is the supplier licensed by the Pennsylvania Public Utility Commission (PUC)?
> - What is the price per kilowatt hour (kWh)? Is the price fixed or does it depend on time of day or usage?
> - Are all taxes included in the supplier's price?
> - What is the length of the agreement? Can your price change in that time? If so, when can it change and how will you be notified?
> - Is there a cancellation fee or any penalty for switching suppliers?
> - Does the supplier offer a choice of energy sources, such as renewable energy?
> - Will you receive one bill or two?
> - Does the supplier offer a budget billing plan?
> - Is there a bonus for signing up?

Conspicuously missing from this list of questions is, "Will I save money on my electric bill if I switch to your service?" Or, "How does your proposed rate compare to my Price to Compare over the term of this contract?"

Even though the end of the rate caps resulted in a significant increase in alternative supplier marketing in Pennsylvania, the Pennsylvania Commission initiated new proceedings to consider how to promote and enhance retail electric competition in 2011. As part of "intermediate" retail market enhancements, the Commission ordered that distribution utilities submit a two-year default service

plan (2013-2015) rather than the prior default service plans that reflected a three-year planning period.[43] The PUC's orders on these plans rejected the use of contracts longer than the two-year plan or the integration of shorter-term "block and spot" contracts to reflect diversity in the portfolio mix. As a result, all the default service plans for 2013-2015 rely primarily on full requirements wholesale market contracts, but do include a mix of wholesale market contracts of various lengths, between 6 months and two years.

As part of the "retail market enhancements" the Commission also ordered all the electric utilities to implement (1) a retail opt-in auction that may result in alternative suppliers awarded the right to serve up to 50% of default service customers; (2) customer referral programs to require the distribution utility to solicit customer enrollment with a supplier under a supervised rate when customers contact the utility to move or initiate service; (3) a requirement that all low income customers participating in the utility Customer Assistance Programs be eligible to migrate to an alternative supplier and that such customers be eligible to participate in the Opt-In Auction and the Referral programs.[44]

The Opt-in Auction program went through several iterations, but the final version ordered by the Commission would require the local utility to issue mailings to all its residential and small commercial customers, including CAP customers, offering the option to enroll in the program and be assigned an alternative supplier. The participating suppliers had to agree to provide a $50 bonus to new customers, enter into a 12-month contract with those who enroll in which the supplier would charge a cents per kWh price that was 5% lower than the default service price at the time of the enrollment for 4 months, and then offer the customer a fixed rate for the following 8 months. The fixed rate would not be known to the customers at the time of enrollment, but would be provided in notices to participating customers and reviewed in some unspecified manner by the Commission. Customers would remain with the supplier unless they affirmatively elected to return to default service or select another supplier. No early termination fees were allowed for this initial 12-month contract period. After ordering the local distribution utilities to implement this program starting in 2014, the Commission suddenly suspended the implementation of this program.[45]

The Customer Referral Program will be implemented in 2014 by electric utilities. In this program the utilities are obligated to discuss retail choice with customers who call to move to establish new service (as well as other calls after the purpose of the call has been satisfied). Under the program the utilities must offer, customers will be given the option to sign up with an alternative supplier who has agreed to offer customers a contract with a 7% reduction in the default service price that is in effect at the time of the initiation of the contract for 12 months. There is no early termination fee. The customer can return to default service at any time, but if the customer is silent, they will remain with the supplier under the supplier's notice of change in contract terms at the end of the 12-month period. The program does

not guarantee that the initial 7% savings will be in effect during the entire 12-month contract since the underlying default service price changes every quarter.

The order that all distribution utilities must develop the means by which low income customers enrolled in the Customer Assistance Programs (CAP) can select an alternative supplier was a dramatic change in Pennsylvania for most CAP customers. While CAP customers served by PPL Electric and the FirstEnergy companies could select an alternative supplier, CAP customers served by PECO Energy and Duquesne Light & Power could not and those latter programs had the largest number of enrollments.

Other reforms that the PA Commission has ordered also include a shortened confirmation period once a customer switch is submitted to the utility, a "seamless move" to allow a customer to move and continue to be served by the customer's alternative supplier, and a requirement that utilities offer customers the option to select an alternative supplier at the time of application of service rather than enrolling in default service.

Finally, in early 2013, the Pennsylvania Commission issued an order that calls for an "end state" for default service that would be implemented after the end of the current two-year default service plans in 2015. In this Order the Commission proposes to retain default service as a distribution utility responsibility, but to rely entirely on purchasing 100% of the required default service load every quarter (90 days) in the wholesale market. All representatives of residential consumers, including the Office of Consumer Advocate, AARP, and the Pennsylvania Utility Law Project, opposed this proposal.[46] The Commission's Order rejected these comments, but acknowledged that this policy would require legislative change, a matter that may arise during the 2013 Legislature in Pennsylvania.[47]

In addition to its focus on attempting to change default service and "push" residential customers into the retail markets, the Pennsylvania Commission has adopted reforms and more stringent consumer protection policies and regulations that are applicable to alternative suppliers. The Commission initiated a rulemaking to adopt additional and more stringent requirements applicable to door-to-door and telemarketing by natural gas and electricity suppliers and adopted a Final Order in 2012.[48] Among the requirements of the new regulations is an acknowledgement that additional oversight of alternative supplier marketing conduct by the Commission requires additional resources and the rule will require suppliers to increase their annual licensing fee to contribute some portion of these additional costs.

Typical of other restructuring states, Pennsylvania also adopted a strong policy to fund and implement meaningful low income bill payment assistance programs as part of the mandate to create retail energy markets. These programs are robust in Pennsylvania and are composed primarily of a bill payment assistance program, called Customer Assistance Programs (CAP), and a no-cost weatherization and

conservation service for low income customers, the Low Income Usage Reduction Program (LIURP).[49] These programs are implemented by each distribution utility. While the program design differs, CAP typically provide a monthly bill benefit that is calculated by taking into account the household's energy bill and the household income or ability to pay, thus targeting larger discounts and benefits to those with the lowest income and larger electric or natural gas bill. CAPs also include an arrears management or forgiveness feature. These programs are based on the approach that households should not be required to pay more than an agreed upon "percentage of income" to ensure that the essential electric and natural gas bills are affordable. In some cases, the CAP benefit is fixed based on a 12-month payment plan. Since each utility calculated their CAP benefits differently, the ability to transfer the customer's benefits when an alternative supplier was selected was not easily determined. Depending on the CAP program design, a customer that selected an alternative supplier that charged more than default service could cause the overall CAP subsidy paid by other customers to increase.

Illinois

The Illinois Electric Service Customer Choice and Rate Relief Law of 1997[50] restructured the state's electric service industry to allow retail competition for generation supply service. Rate caps for residential customers were in effect for the early years until 2007. At that time the Illinois regulators required the electric utilities to conduct an auction in 2006 to acquire default service that would go into effect on January 1, 2007. The results of the auction resulted in a 40%-55% average total bill increase for residential customers of Ameren in southern Illinois, and increases of over 100% for Ameren's residential electric heat customers who had relied on a very low price for electric space heating that had previously been promoted by the utility. Commonwealth Edison residential customers in the Chicago area saw an average of a 25% total bill increase. These increases were widely criticized and the Legislature adopted restructuring reform legislation in 2007. This legislation approved a settlement reached between the Illinois Attorney General, the utilities, and the wholesale market generators that provided $1 billion in short-term rate relief to Illinois customers that reduced the impact of the wholesale market price increase. Utility shareholders provided the funding for this settlement.[51] As a result, the auction results were muted in their impact on customer bills.

The legislation also adopted significant reforms to the Illinois restructuring law, particularly with respect to the future planning and acquisition of electricity for Default Service. The foremost reform is to eliminate the reliance on the auction that the Illinois Commission had adopted previously. Rather, Default Service must be provided under a procurement plan that must assure "adequate, reliable, affordable, efficient and environmentally sustainable electric service at the lowest total cost over time, taking into account any benefits of price stability...."[52] The procurement plan must be developed and submitted for public review and comment in an open and transparent process and the plan must rely on competitive procurement that is monitored by neutral parties and personnel. The bill creates a new state entity, the Illinois Power Authority, which is given a wide range of authority to consider various types of wholesale market contracts for default supply and prepare future procurement plans that the Commission must review and then order the utilities to implement.

Recently, Illinois adopted the statutory basis for allowing municipal or local governmental aggregation programs. Pursuant to this authority, there has been a dramatic increase in the use of this option by Illinois municipalities, including Chicago. Pursuant to this program, once adopted and approved by municipal voters, the municipal or county authority will negotiate a contract for retail electric supply service with alternative suppliers. In effect, the winning alternative suppliers in those areas that have adopted the governmental aggregation approach will provide default service. There are two different types of aggregation programs: Opt-out and Opt-in.

Opt-out requires the voters of a municipality or county to pass a referendum that automatically combines the electric load for residential and eligible small businesses for purchasing purposes except for those customers who actively choose not to participate in the municipality's or county's purchase program.

Opt-in aggregation program means that after the authorities within a municipality or county adopt an ordinance to combine the electric load for residential and eligible small businesses for purchasing purposes, only those residents and eligible small businesses that actually take action to "opt-in" to participate in the aggregation program are able to have their electric load included in the aggregation program and take advantage of the price negotiated on their behalf.

The list of the municipalities that are considering or have adopted this aggregation program is lengthy.[53] As a result, there has been a dramatic drop in the need for the Illinois Power Authority to purchase default service in the wholesale market. Under this municipal aggregation program, the distribution utility will continue to assume the responsibility for billing and collection. Customers will receive a bill from their distribution utility and list the retail supplier's name and price pursuant to the municipal aggregation contract.

Illinois' retail natural gas market developed on a faster pace than the retail electric market in the upstate and greater Chicago area, but has not been implemented for the Ameren distribution utility service territories in the rest of Illinois. The Commission now implements a more comprehensive consumer protection and licensing requirements applicable to natural gas suppliers, but originally relied on the natural gas distribution utilities to impose certain codes of conduct on suppliers who were authorized to sell natural gas supply service to the distribution utility's customers, an approach that is widely viewed as ineffective. According to the Commission's 2012 annual report, there were 25 natural gas suppliers licensed pursuant to the newly adopted consumer protection regulations.[54] The Illinois Commission does not publish natural gas retail migration information.

A comparison of the residential customer migration since 2010 for Commonwealth Edison's customers shows the slow growth for the retail electric market until very recently. In 2010, 699 Commonwealth Edison residential customers were served by alternative electric suppliers, increasing to 102,457 in 2011, a tiny percentage of the Company's 4 million customers. However, as of March 2013, 65.5% of the utility's residential customers were served by an alternative supplier.[55] This explosion of residential migration is almost entirely due to the municipal aggregation program described above and reflects the early 2013 migration of the City of Chicago's residents to a retail supplier selected to provide service at a price below that default service price of Commonwealth Edison.

At the time of the adoption of the reforms to the electric restructuring law, Illinois also adopted a new statewide low income bill payment assistance program.[56]

Called the Percentage of Income Payment Plan (PIPP) program, low income customers who apply for LIHEAP are offered the option of entering this program and using their LIHEAP benefits to create a monthly credit that will result in a more affordable monthly bill. This bill credit is calculated on comparing the household's electric and/or natural gas bill to the household's annual income, intending to prevent energy bills in excess of 6% of the total annual household income. The more traditional use of the LIHEAP funds as a single grant that is applied to the current outstanding utility bill is also available. The PIPP program customers must pay their reduced monthly bill to obtain the credit and can enter an arrearage management program to help reduce outstanding arrears owed to the utility. This program is implemented by the same agencies that deliver LIHEAP and WAP in Illinois. The program is funded by a ratepayer funded contribution to the LIHEAP program that was included in a new law. The fund annually generates $95 million via a $.48 addition to the current monthly customer service (metering) fee paid by all residential customers and corresponding increases in the same fee for commercial and industrial customers.

While the statute allows alternative suppliers to "elect" to participate in this program and serve PIPP customers, no such procedures have been developed or implemented. According to the brochure issued by one of Illinois' largest community agency that implements LIHEAP, WAP, and PIPP, customers who enroll with an electric or natural gas alternative supplier are not eligible for PIPP and if PIPP customers enroll with a supplier after enrolling in PIPP, they may be removed from the PIPP program.[57]

The integration of PIPP into the retail energy market structure in Illinois has been complicated. In the retail electric market, most suppliers are offering rates that are lower than the Commonwealth Edison default service price at this time. Furthermore, a purchase of receivables program has been approved for retail electricity sales so that the distribution utility purchases the supplier's receivables and assumes the obligation to bill and collect for those charges. In fact, customers enrolled in PIPP can select an alternative electric supplier and participate in the municipal aggregation programs without threatening the PIPP credits. Under these electric market programs, the electric distribution utility retains the function of billing and collecting the supplier charges on the utility bill and purchases the supplier receivables. As a result, the PIPP customer's fixed monthly payment requirement remains the same and, depending on the level of bill reduction that will occur with the selection of the alternative supplier, will either see an additional bill credit at the annual true-up of the program's budget billing program or the surplus will result in additional program funds available to the PIPP in the next program year.[58]

The situation is different, however, with natural gas service for PIPP customers. First, as documented by CUB in its Gas Market Monitor (and summarized later in this Report), the vast majority of alternative gas suppliers charge higher prices than the customer would have paid with distribution utility

default service. Second, there is no approved purchase of receivables program for natural gas supply service. As a result, the natural gas utility cannot disconnect service for supplier charges and the allocation of partial payments favor the gas utility's charges as compared to the supplier's charges. Therefore, if a PIPP customer enrolls with a gas supplier, the distribution utility will continue to bill for the required PIPP calculated fixed monthly payment but will also add the new supplier charges to the customer's bill since those supplier charges are not eligible for PIPP payment subsidies. The customer who unknowingly has selected an alternative gas supplier will receive a significant bill increase. It is for this reason that PIPP customers are discouraged from selecting an alternative gas supplier and urged to terminate their contract with a gas supplier in order to retain or enter the PIPP program.[59]

Starting in 2008, Illinois experienced several widely publicized legal and regulatory proceedings directed to alternative natural gas suppliers. The Attorney General of Illinois sued U.S. Energy Savings Corp. (whose name was changed to Just Energy in 2012), alleging slamming and misrepresentation under the State's Unfair Trade Practices Act. USESC marketed almost exclusively by door to door to residential and small commercial customers, offering 4-5 year fixed price natural gas supply contracts.

During this same period, the Citizens Utility Board and AARP filed a formal complaint[60] with the Illinois Commerce Commission seeking an investigation of U.S. Energy Savings Corp. (USESC), alleging:

- Slamming or changing the customer's natural gas supplier without proper authorization or misleading the customer about the nature of the document they were signing;
- Sales practices that told customers they would "save money" by signing up with USESC;
- Sales practices that told customers they would not see any gas price increases if they signed up with USESC;
- Sales practices in which representatives of USESC appeared to associated themselves with the natural gas utility or a state agency so that customers were led to believe that the USESC contract was part of a government program;
- Sales practices in which customers were mislead about the long term nature of the contract and the existence or size of the early termination fee;
- Sales practices in which USESC took advantage and perhaps targeted non-English speaking customers, or those who were elderly and confused about the nature of the transaction;
- Sales practices in which USESC presented false and misleading information on natural gas prices or the relationship of natural gas prices to other commodities, such as the price of gasoline; and

- Contractual practices in which USESC charges exorbitant and unreasonable termination fees.

This complaint was fully litigated and the Illinois Commission issued its Order finding certain violations by the supplier in April 2010 with regard to changing a customer's supplier without sufficient authorization and misleading marketing materials concerning its price disclosures. While the Commission's order imposed relatively modest financial penalties, it did require significant changes to the supplier's management oversight of its door-to-door marketing sales agents, including independent audits. Contrary to the recommendations of CUB and AARP, the Commission did not suspend the license or prohibit the use of door to door marketing for any period of time until changes could be documented as having been implemented and effective in reducing customer complaints.

As a result of these investigations and other customer complaints, the Illinois Legislature adopted reforms to its statutory requirements for natural gas suppliers and electric suppliers.[61] These reforms tighten certain licensing requirements, requires the supplier to document that it has "sufficient managerial resources and abilities to provide the service" for which it seeks to have approved, requires additional filings of materials from suppliers that use door to door marketing the document compliance with Commission and other consumer protection and/or unfair trade practice laws, imposes customer calling center performance requirements, requires additional disclosures and minimum requirements for customer authorization to change their supplier, mandates a new uniform disclosure form for prices and material terms and conditions, and prohibits any penalty for early termination of the contract by the customer in excess of $50.

Massachusetts

The Massachusetts Electric Industry Restructuring Act states that, as of March 1, 2005, default service is the generation service that is provided by distribution companies to those customers who are not receiving service from a competitive supplier. As such default service acts as a "generation service of last resort." The Department established two pricing options for default service customers: (1) a variable pricing option in which the price changes monthly; and (2) a fixed pricing option in which the variable monthly prices are averaged and remain constant for six-month periods. Customers were assigned to the six-month fixed rate as a default service and must affirmatively request the monthly variable rate option. In June 2002, the Department revised default service pricing and procurement policies. For residential and small commercial customers, the Department directed each distribution company to procure 50 percent of its default service supply semi-annually, for 12-month terms. As a result, default service prices for these smaller customers (for both the monthly and the six-month pricing options) are now based on an average of the results of two separate procurements.[62]

As of December 2012, 12.5% of residential customers (slightly over 300,000) were served by an alternative electric supplier. The migration statistics published by the Energy Department do not indicate whether this figure includes customers served under the Cape Light Compact, a municipally authorized opt-out aggregation program.[63] In any case, the level of retail migration for residential customers is lower than, for example, New York and Pennsylvania.

Massachusetts regulators also moved to implement unbundling of natural gas charges and established the process for a retail natural gas market in 1998-2000.[64] Natural gas supply prices for default service change every six months in Massachusetts. However, the residential migration rate to natural gas suppliers is less than 1% for any Massachusetts natural gas utility.[65]

The Massachusetts Department of Public Utilities has implemented a robust low income assistance program for gas and electricity customers that is funded by all customers that takes the form of a 40% discount on the distribution portion of the bill (resulting in an average discount of 25% on the total bill), as well as an arrears management program.[66],[67] These programs are available to customers with an annual household income that does not exceed 200% of the federal poverty guidelines. As a result, Massachusetts low income customers are able to shop and select an alternative supplier since their discount is applied only to the regulated distribution portion of their bill. There has not been any analysis of the experience of low income customers in the retail energy markets or whether their bills are higher or lower than otherwise applicable default service.

While the DPU licenses alternative suppliers, its regulations are not as comprehensive or detailed as those adopted in, for example, Pennsylvania or Illinois. The Department does not sponsor a website that offers comparative pricing

between default service and licensed alternative electric or natural gas suppliers. Although the Department lists default service prices for each utility on its website and separately identifies licensed suppliers on its website, there is no information on supplier prices or terms and conditions and consumers cannot shop and compare rates in Massachusetts on any central web portal that is routinely updated.

Furthermore, the DPU's oversight is complicated in part by the jurisdiction of the Massachusetts Attorney General under its unfair trade practice jurisdiction. Unlike most states that have focused on licensing and enforcement at the regulatory commission, both the DPU and the Massachusetts Attorney General have adopted regulations applicable to the sale of energy services for residential customers. The Massachusetts Attorney General's regulations require certain disclosures and prohibit certain unfair or deceptive marketing conduct by alternative suppliers.[68] Among its provisions:

> 940 CMR 19.04: It is an unfair or deceptive act or practice for a retail seller of electricity to make any material representation to the public or to any consumer, either directly or through any type of marketing or agreement, or through the use of any misleading symbol or representation, which the seller knows or should know has the capacity or tendency to deceive or mislead a reasonable consumer, or that has the effect of deceiving or misleading a reasonable consumer, in any material respect, including but not limited to representations relating to:
>
> (a) the quality, environmental or other characteristics, or source of any product or service being offered for sale by any retail seller of electricity.
>
> (b) the business relationship between any retail seller of electricity and any distribution company.
>
> (c) benefits to the consumer arising from the business relationship between a retail seller of electricity and a distribution company.
>
> (d) any term of any agreement to be entered into by the retail seller of electricity and a consumer.
>
> (e) the distribution price, the generation price or the total delivered price of electricity or the price of any related electricity products or service to be charged to a consumer.
>
> (f) the likelihood that a consumer will be able to purchase electricity or related products or services at a particular price, where the price depends upon the level of the consumer's electricity usage or any other variable.
>
> (g) the difference between any price being charged by any retail seller of electricity, including a distribution company, and any price being charged by any other retail seller of electricity, including a distribution company.
>
> (h) the amount of money to be saved by a consumer, expressed in any manner, if a consumer chooses one retail seller of electricity, including a distribution company, over any other entity selling electricity.
>
> (i) the time period during which any offered price will be available.
>
> (j) the period of time for which any price will remain in effect.
>
> (k) the informational disclosures required to be provided by 220 CMR 11.06

(DPU's regulations) including but not limited to the electricity information label.

While the Massachusetts DPU has not initiated any proceedings that directly seeks changes or enhancements to the retail electric or natural gas markets, the Department of Public Utilities opened an Investigation on its Own Motion into Modernization of the Electric Grid in October 2012.[69] In this Notice the Department asked questions relating to the role of Basic Service with respect to time-varying rates, suggesting that time-varying rates should be considered as the default service may be provided based on a time-varying rate structure in the future, and raised issues relating to consumer protection policies associated with smart grid technologies. This proceeding is pending in the form of a Collaborative with a final report due July 2013.

New York

There is no explicit statutory mandate for "restructuring" in New York and, as a result, there is no statutory guidance on default service procurement policy other than the obligation of public utilities to provide this essential service at reasonable rates. However, in 2002, the New York enacted the Energy Consumer Protection Act of 2002. Under ECPA, all of the protections defined by the consumer bill of rights are made applicable to the transactions between the competitive suppliers and residential consumers. With respect to the commencement and continuation of service, these include rules with respect to deposits, budget billing, estimated bills, plain language bills, third-party notices and other protections found for low income, elderly and disabled customers in New York's consumer bill of rights. In the event a residential customer accumulates an arrears with the competitive supplier, as with an arrears to the utility supplier, the customer is entitled under the bill to notice of the reason for termination and notice of the procedures for avoiding termination. The customer is also entitled to the opportunity to continue service despite the arrears through a deferred payment agreement and to the further protections provided for households experiencing medical emergencies, for households with elderly, blind or disabled customers, and for households that might experience a loss of service in a cold weather season.

Under ECPA, service from the competitive supplier can be restored, as it is for utility service today, upon the guarantee of payment by the local social services district, and a reconnection can be ordered by the Department of Public Service. Finally, ECPA allows the residential customer taking service from a competitive supplier who has a billing or service dispute with that supplier to pay the portion of the bill not in dispute and to take that complaint to the Public Service Commission for an informal hearing or formal hearing and written determination.

New York utilities are not required to purchase default service pursuant to a uniform methodology or procurement policy. The Commission has approved a utility-specific methodology to purchase default service, but in most cases, the utilities are required to pass through monthly wholesale market prices. However, each utility also has sought to mitigate the volatility of such an approach with a variety of mechanisms and reconciliation clauses. The Commission has promoted short-term acquisitions by utilities on the wholesale market, but has also authorized "hedging" practices to ameliorate price volatility.[70] However, the Commission has not issued any comprehensive order with respect to hedging or long term contracts.

The statewide migration rate for residential electric customers is 22.5% as of May 2012, the month for which the most recent information is available. This level of customer migration has not changed significantly in recent years, an increase of only 3.2% since December 2010. A similar trend is evident for natural gas migration rates even though the ability to select an alternative supplier has existed for over a decade. As of April 2012, the month for which the most recent information is available, 20.1% of New York's residential natural gas customers are served by an

ESCO. This percentage varies considerably by utility, with higher migration rates at downstate utilities where supply prices are generally higher.[71]

The New York Commission has, in addition to the application of the traditional consumer protection policies under ECPA, imposed Uniform Business Practices on alternative natural gas and electric suppliers. These "business practice" regulations include certain disclosure requirements and prohibitions on misleading and deceptive marketing and contract practices. While the Commission "licenses" alternative suppliers, it does so without any explicit statutory requirements or additional enforcement authority applicable to competitive entities.

The New York Commission has historically promoted and widely advertised the existence of the retail energy markets[72] and has required the distribution utilities to implement Customer Referral programs and purchase of Receivables programs. Under the Referral programs, the utility seeks to engage the customer in the selection of an alternative supplier at the time the customer calls to initiate service. Each utility's Referral program offers a variation on the general theme that the supplier will guarantee a certain discount off the current default service price for a 3-4 month period. For example, Central Hudson Gas & Electric (serving upstate New York) offers customers the "EnergySwitch" program in which customers are offered the option of allowing the utility to assign the customer to an alternative supplier with a guaranteed 7% discount for two months. During this time the customer can respond to the supplier's contract offers and if the customer agrees, the supplier will submit the necessary enrollment information to the utility.[73] The New York Commission also supports a website in which customers can enter their zipcode and see electric and natural gas supplier offers available to them.[74] However, the presentation of the "price to compare" on this website references various mechanisms that will impact on the cents per kWh or cents per therm identified each month so that the customer does not have a single rate or price that is provided to compare to the listed supplier prices. Furthermore, when a supplier offers a variable rate, the website typically states that the price will vary according to "market conditions." As a result, the customer is not informed about the actual mechanism that will be used to calculate the monthly change in price from the supplier.

Low income programs implemented by New York utilities vary in scope and design and are typically addressed in the context of electric and natural gas utility base rate cases. However, all New York utilities operate one or more low income discount or bill payment assistance programs that typically piggyback the eligibility for LIHEAP. For example,

- Consolidated Edison reports that 372,728 electric customers are receiving a low income rate.[75] Gas customers also receive a reduced minimum customer charge discount and a per therm rate reduction. Low Income gas heating customers are served under a tariffed low income rate that provides a $7.65 discount o the minimum monthly charge (3

therms) and a 49% reduction off the otherwise applicable per therm rate for the next 87 therms.[76] For program year April 2011 through May 2012, the electric rate reduction totaled $36.1 million. For the program year ending September 2011, the low income gas reductions totaled $6.747 million.

- Orange and Rockland provides natural gas residential heating low income customers a monthly bill reduction of $17.40. Electric low income customers will receive a monthly bill reduction of $7.00, $8.00, and $9.00 for rate years 1 through 3.[77]

- New York State Electric and Gas and Rochester Gas and Electric both substantially expanded their gas and electric low income programs in a settlement of a 2010 rate case. According to the Commission's Order approving a settlement on these program expansions, the "need is indisputable," "current participant levels were inadequate," and "increases are demonstrably reasonable and necessary."[78] Based on the total participants and costs reported in the 2011 Report, the monthly bill reduction appears to average $16.77 for NYSEG and $11 for RG&E customers.

National Grid's Brooklyn Union Gas Co. (KEDNY) and KeySpan Gas East Corp. (KEDLI) operate low income gas programs that provide a fixed monthly bill reduction (based on a percentage of the otherwise applicable monthly customer charge) and a rate discount on the monthly per therm charges.

There are no restrictions on the participation by low income customers in these programs in the retail energy markets.

The New York Commission opened a Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets in New York State in October 2012.[79] The Commission's Notice opening this proceeding sought information on potential reforms in response in part to an investigation conducted by its Staff and the information publicly reported by the Public Utility Law Project of New York that documented that the vast majority of customers being served by suppliers were paying higher prices than the utility default service charges. Among the various questions and issues on which the Commission sought comments were issues relating to whether low income customers should participate in the retail energy markets, whether additional consumer protections and disclosures should be adopted, and how the Commission could improve its outreach and education programs relating to retail competition.

In response to this notice, AARP and PULP submitted joint comments on January 25, 2013[80] that called for at least a temporary halt to allowing known low income

customers to enroll with alternative suppliers, a mandate that utilities offer bill calculators on their website and that the Commission promote their existence to customers as a means of comparing historical default service prices with a specific supplier's prices, a reduction in the allowed early termination fee from $150 to $50, and additional licensing and consumer protection regulations associated with door to door marketing, variable rate contract terms and disclosures, and renewal contract terms. This proceeding is still pending before the Commission and no specific order or reforms have yet been proposed.

APPENDIX B: BEST PRACTICES FOR REGULATION OF DOOR-TO-DOOR AND TELEMARKETING FOR ENERGY SERVICES

The following best practices should be adopted by state regulators as conditions associated with alternative supplier marketing practices:

- Suppliers should be required to develop and implement standards and qualifications for employees and agents engaged to interact with retail customers, and document that it has procedures in place to prevent the hiring or engagement of individuals that do not meet these standards;

- A supplier should be explicitly prohibited from hiring or allowing any agent to represent it unless it has conducted a criminal background check on the individual obtained from the appropriate Ohio authorities and any other state in which the individual has resided in the last 12 months. Suppliers should be required to conduct such background checks on existing employees or agents within six months of the effective date of the regulations. This background check should include, but not be limited, to any sex offender database maintained by the State.

- Suppliers should be explicitly prohibited from retaining, hiring or engaging any employee or agent who was convicted of a felony or misdemeanor when the conviction reflects adversely on the person's suitability for such employment.

- A supplier shall ensure the training of its agents on the following subjects:
  - State and Federal laws and regulations that govern marketing, telemarketing, consumer protection and door-to-door sales, including state-specific consumer protection laws and regulations.
  - Responsible and ethical sales practices as described in these regulations.
  - The supplier's products and services.
  - The supplier's rates, rate structures and payment options.
  - The customer's right to rescind and cancel contracts.
  - The applicability of an early termination fee for contract cancellation when the supplier has one.
  - The necessity of adhering to the script and knowledge of the contents of the script if one is used.
  - The proper completion of enrollment and customer authorization documents.
  - The supplier's disclosure statement.
  - Terms and definitions related to energy supply, transmission and distribution service.
  - Information about how customers may contact the supplier to obtain information about billing, disputes and complaints.

- The confidentiality and protection of customer information as required by state law and regulations.

- Suppliers should be required to document the training of an agent and maintain a record of the training for 3 years from the date the training was completed.

- Suppliers should be required to make training materials and training records available to the Commission upon request, as well as evidence that the training materials and records have resulted in reasonable management oversight to implement the training requirements.

- Suppliers should be required to monitor a representative sample of telephonic and door-to-door marketing and sales calls to: (1) Evaluate the supplier's training program; (2) Ensure that agents are providing accurate and complete information, complying with applicable rules and regulations and providing courteous service to customers.

- Suppliers should be required to develop and implement a disciplinary program to ensure compliance with its training programs and these regulations and document that such disciplinary program has been implemented to prevent violations and internal management failures.

- Suppliers must issue an identification badge to employees or agents that interact with consumers in door to door sales or public events. The badge must:
  - Accurately identify the supplier, its trade name and logo.
  - Display the agent's photograph.
  - Display the agent's full name .
  - Be prominently displayed.
  - Display a customer-service phone number for the supplier.

- Suppliers should be required to affirmatively identify the name of the Supplier that he represents and affirmatively state that he is not working for and is independent of the customer's local distribution company or other supplier. This requirement shall be fulfilled by both an oral statement by the agent and by written material provided by the agent.

- When conducting door-to door activities or appearing at a public event, an agent should be prohibited from wearing apparel or accessories or carry equipment that contains branding elements, including a logo, suggests a relationship that does not exist with any distribution utility, government agency or another supplier.

- A supplier should not be able to use the name, bills, marketing materials or consumer education materials of another supplier, distribution utility, or government agency in a way that suggests a relationship that does not exist.

- A supplier or supplier agent may not say or suggest to a customer that utility customers are required to choose a competitive energy supplier.

- Door to door sales should comply with local ordinances regarding door to door marketing and sales activities.

- Door to door sales should only occur during the hours between 9 a.m. and 7 p.m. during the 6 months beginning October 1 and ending March 31, and to the hours between 9 a.m. and 8 p.m. during the months beginning April 1 and ending September 30. When a local ordinance has stricter limitations, a supplier shall comply with the local ordinance.

- When regard specifically to door-to-door sales or telemarketing marketing activities, an agent should be required to comply with the following:
  - After greeting the customer, the agent shall immediately identify himself by name, the supplier the agent represents and the reason for the visit. The agent shall state that he is not working for and is independent of the local distribution company or another supplier.
  - The agent shall offer a business card or other material that lists the agent's name, identification number and title and the supplier's name and contact information, including telephone number. This information does not need to be preprinted on the material. When the information is handwritten, it shall be printed and legible.

- When a customer's language skills are insufficient to allow the customer to understand and respond to the information being conveyed by the agent, or when the customer or a third party informs the agent of this circumstance, the agent shall terminate contact with the customer.

- When an agent completes a transaction with a customer, the agent shall:
  - Provide a copy of each document that the customer signed or initialed relating to the transaction. A copy of these documents shall be provided to the customer before the agent leaves the customer's residence. If requested by the customer, a copy of the materials used by the agent during the call shall be provided to the customer as soon as practical.
  - Explain the supplier's verification process to the customer
  - State that the supplier shall send a copy of the disclosure statement about the service to the customer after the transaction has been verified if the disclosure statement has not been previously provided.
  - State that the customer may rescind the transaction within seven business days after receiving the disclosure statement.

- An agent shall immediately leave a residence when requested to do so by a customer or the owner or an occupant of the premises or if the customer expresses no interest in what the agent is attempting to sell.

- A supplier shall comply with an individual's request to be exempted from door-to-door marketing and sales contacts and annotate its existing marketing or sales databases consistent with this request within 2 business days of the individual's request.

END NOTES

[1] Each state has adopted a slightly different term to refer to the retail energy suppliers and marketers, such as Electric Generation Supplier (EGS), Natural Gas Supplier (NGS), Competitive Retail Electric Supplier (CRES), Energy Service Company (ESCO), etc. This Report will use the term "alternative supplier" to refer to both natural gas and electricity suppliers that are licensed to provide generation supply or commodity service to residential customers.

[2] The move to adoption of electric and natural gas restructuring and attempt to create a competitive retail market for generation supply and natural gas supply services was halted by many states with the market implosion that occurred in California in 2000, the bankruptcy of Enron, and the subsequent repeal or suspension of retail competition in several states, including California, Arizona, Nevada, Oregon, Montana, Arkansas, Oklahoma, and Virginia. As a result, only approximately 15 states have retained the retail competition model or continued a commitment to develop that model in practice. One of these States is Texas, but its market model is unique among the state restructuring models and it will not be the focus of this Report.

[3] One of the key differences between electricity and natural gas markets is that electricity cannot be stored and the supply and demand must be instantaneously balanced on the transmission system. This obligation is ensured with high reserve requirements in the wholesale electric market. Natural gas, on the other hand, can be stored and this feature allows short-term price volatility in the wholesale market to be ameliorated, at least in part. In both markets, wholesale market contracts are available to create a portfolio of diverse contract types and this also operates to ameliorate retail price volatility.

[4] This service is universal among the States included in this Report, but it is called a variety of names, such as Basic Service, Standard Offer Service, and Price to Compare. This Report will use the term "default service" throughout for consistency and ease of presentation.

[5] There is a third service—Transmission—the charge for which are regulated by FERC because it is a reflection of long distance wires or pipelines, but this service is either included in the Distribution portion of the bill or the Default Service portion of the bill and is not relevant to the issues presented in this Report.

[6] The expansion of utility sponsored low income programs occurred in Massachusetts, Pennsylvania, and, to a lesser extent, in New York. However, there was no expansion of or mandate to increase low income funding in Illinois until much later.

[7] Alexander, Barbara, "Update on Default Service Developments: Retail Electric Competition," (July 1, 2006)

[8] The only State in this Report that has not adopted Purchase of Receivables is Illinois for gas service, but even Illinois has adopted POR for electric service.

[9] The COMPETE Coalition, an organization with energy suppliers and larger commercial and industrial customers, maintains that the move to restructuring has resulting in savings in electricity costs to consumers. See, e.g., Comments of the COMPETE Coalition in the New York Commission's Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-Residential Retail Energy markets in New York State, Case 12-M-0476 (January 25, 2013). Contrast these statements with an analysis of Kenneth Rose, *State Retail Electricity markets: How are They Performing So Far?*, Electricity Policy.com, http://electricitypolicy.com/articles/4455-stateretailelectricitymarkets (available by subscription). Dr. Rose concludes that consumer benefits have not yet appeared or been documented, particularly for residential customers. A similar view is reflected in the analysis and report issued by the American Public Power Association. According to a recent analysis, prices in "deregulated" states are 3 cents per kWh above rates in regulated states. This gap is slightly higher than the gap of 2.8 cents per kWh that existed among these same states in 1997, the onset of the restructuring era. See, APPA, *Retail Electric Rates in Deregulated and Regulated States: 2012 Update*, available at:
http://www.publicpower.org/files/PDFs/RKW%5FFinal%5F%2D%5F2012%5Fupdate.pdf

[10] See, e.g., Snyder, Lynne Page, PhD, MPH, National Energy Assistance Directors' Association, Baker, Christopher A. AARP Public Policy Institute, Affordable Home Energy and Health: Making the Connections, AARP (June 2010).

[11] The National Energy Assistance Directors Association conducts periodic surveys of LIHEAP recipients. The most recent survey in 2011 documented that 90% of recipient households have at least one vulnerable member, defined as someone age 60 or older, age 18 or younger, or disabled, for whom loss of heat in winter or cooling in summer could have serious safety and health consequences. As many of 37% of these households went without medical or dental care, 34% did not fill a prescription or took less than their required dose, and 19% became sick because the home was too cold. 77% of the LIHEAP households reported total annual household income of less than $20,000. The survey and results are available at http://www.neada.org/news/nov012011.html

[12] Direct Testimony of William D. Yates, C.P.A., on behalf of the Public Utility Law Project of New York, Inc., before the New York Public Service Commission, Proceeding for Niagara Mohawk Power Co. for Natural Gas and Electric Rates, Case No. 12-G-0202 and Case No. 12-E-0201 (August 31, 2012).

[13] Direct Testimony of Stephen Krone, on behalf of Coalition for Affordable Utility Services and Energy Efficiency in Pennsylvania, before the Pennsylvania Public Utility Commission, Petition of PPL Electric Utilities Corporation for Approval of a Default Service Program and Procurement Plan for the period of June 1, 2013 through May 31, 2015, Docket No. P-2012-2302074 (July 20, 2012).

[14] See CUB's Gas Market Monitor, available at:
http://www.citizensutilityboard.org/GasMarketMonitor.php

[15] See: In the Matter of the Joint Motion to Modify the June 18, 2008 Opinion and Order in Case No. 07-1224-GA-EXM, Case No. 12-1842-GA-EXM, OPAE Exhibit 1, Direct Testimony of Stacia Harper (October 4, 2012) at 14 and Exhibit SH-3; In the Matter of the Joint Motion to Modify the December 2, 2009 Opinion and Order and the September 7, 2011 Second Opinion and Order in Case No. 08-1344-GA-EXM, Case No. 12-2637-GA-EXM, OPAE Exhibit 2A at SH-3, Direct Testimony of Stacia Harper (November 30, 2012).

[16] Case No. 12-2637-GA-EXM, OPAE Ex. 2A at Exhibit SH-7.

[17] Id.

[18] This Report is available from the Auditor General of Ontario at
http://www.auditor.on.ca/en/reports_en/en11/302en11.pdf

[19] This evaluation was conducted in early March 2013 by the author in reviewing the CT Energy Info website which provides such comparative pricing information for each Connecticut utility and for electricity and natural gas service. See, www.ctenergyinfo.com

[20] The quotes in this section are taken directly from the submissions listed as Public Comments in the Commission's online case file.

[21] This individual's comment about his contract with a green power adder should be contrasted with that of another customer describing the sales conduct and contract terms of the same supplier in which the latter customer recognized that the promise of the lower price would only be in effect for two months, followed by a variable rate "which would be determined by business and market conditions." See,
http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=41126#

[22] This compilation of complaint data was requested from the Ohio PUC by the Ohio Partners for Affordable Energy and included as part of OPAE's Reply Comments in a proceeding initiated by the Ohio Commission seeking comment on the need for potential reforms to its current retail electric and natural gas supplier consumer protection regulations. Cases 12-095-GA-ORD and 12-1924-EL-ORD. The Commission has not yet issued any final order in this proceeding.

[23] Delaware PSC, Order No. 7626, In The Matter Of The Investigation Into The Business And Marketing Practices Of Horizon Power & Light, LLC , PSC Docket No. 355-08 (August 18, 2009)

[24] Pennsylvania PUC, Press Release, March 20, 2013, available at:
http://www.puc.state.pa.us/about_puc/press_releases.aspx?ShowPR=3134

[25] Maryland PSC, In the Matter of the Commission's Investigation into Ohms Energy Co., LLC's License to Supply Electricity or Electric Generation Service in Maryland, Case No. 9118, Order Suspending License of Ohms Energy Co. (August 24, 2007).

[26] Maryland PSC, In The Matter Of The Complaint Of The Staff Of The Public Service Commission Against North American Power And Gas, LLC, Case No. 9252, Order No. 84096 (June 9, 2011).

[27] Maryland PSC, Press Release, June 7, 2012, available at

[28] This chart was complied by the National Consumer Law Center based on EIA 2011 Electricity Annual report data.

[29] https://acctsvcs.nationalfuelgas.com/HistRateCompUnauth.aspx

[30] Although recommended by the Office of Consumer Advocate, the Pennsylvania Commission rejected these consumer protections in its retail market enhancement orders.

[31] Of course, alternative suppliers can (and anecdotally do) refuse to serve LIHEAP customers.

[32] Before the Pennsylvania Public Utility Commission, Petition of PECO Energy Company for Approval of its Customer Assistance Program Shopping Plan, Docket No. P-2012-2283641 (May 1, 2013). This proposal is pending.

[33] Unlike most other states with ratepayer funded low income programs, Pennsylvania imposes the incremental costs of these programs on residential customers only and not all customer classes.

[34] Institute for Energy Research provides a chart showing the renewable energy mandates for each state. http://www.instituteforenergyresearch.org/renewable-mandates

[35] This recommendation does not apply to other non-recurring fees, such as an early termination fee or late fee. However, if a supplier charges a fee for services that the Commission determines should not be allowed outside of the stated price, such as a fee for filing a complaint, accessing the calling center, or seeking prior billing information in a dispute, these fees should also be included in the uniform pricing disclosure methodology recommended here. Fee such as those described here have routinely been charged by Texas retail electricity providers who are not currently required to include such fees in basic service price disclosures.

[36] www.cincinnatibellenergy.com

[37] http://www.energypluscompany.com/residential/faqs.php

[38] Truth in Lending Act, 15 U.S.C. §1601, et seq. and its implementing Regulation Z, 12 C.F.R. Section 226. For example, for variable rate credit applications and solicitations, creditors must disclose the fact that the rate may vary and state how the rate will be determined, including identifying the index or formula and any margin or spread added to the index or formula. For introductory "teaser" rates that are temporary, the creditor must also disclose the annual percentage rate that will apply after the introductory rate expires. Special rules also govern the accuracy and currency of disclosed rates. See, e.g., 12 C.F.R. 226.5a(b)(1). Variable rate mortgages must disclose how the interest rate would change based on the prior 15-year history of the index used to trigger rate changes.

[39] Electric Generation Customer Choice and Competition Act, 66 Pa. C.S. §§ 2801-2812; The Natural Gas Choice and Competition Act, 66 Pa. C.S. chapter 22.

[40] See, e.g., http://www.oca.state.pa.us/Industry/Electric/elecomp/ElectricGuides.htm

[41] See, e.g., http://www.oca.state.pa.us/Industry/Electric/elecstats/ElectricStats.htm

[42] www.papowerswitch.com A similar website has been developed for residential gas supply service at www.pagasswitch.com

[43] http://www.puc.state.pa.us/pcdocs/1158196.docx

[44] Pennsylvania PUC, Final Order on Intermediate Work Plans (March 2, 2012), available at: http://www.puc.state.pa.us/pcdocs/1167521.docx

[45] Final Order on Reconsideration (April 4, 2013), Docket No. P-2012-2283641, et al., available at: http://www.puc.state.pa.us//pcdocs/1222757.docx

[46] Both the Office of Consumer Advocate and a coalition of consumer organizations, including AARP and the Pennsylvania Utility Law Project, filed comments in opposition to this "end state" model, citing the potential for volatility in the price of default service and higher bills particularly during the summer months when wholesale prices are higher. These commenters sought to retain the current statutory policies governing default service in Pennsylvania. See, e.g., the consumer coalition comments at http://www.puc.pa.gov/pcdocs/1203493.pdf

[47] This Order is available at: http://www.puc.state.pa.us/pcdocs/1214105.docx

[48] Rulemaking Re: Marketing and Sales Activities for the Retail Residential Energy Market, Docket No. L-2010-2208332. These rulemaking changes have recently completed their final review by legislative agencies and are expected to be published as final in the Pennsylvania Bulletin in June 2013.

[49] According to the Pennsylvania Commission's 2011 Universal Service Program report, LIURP

spending in 2011 totaled $25.6 million for the larger electric utilities and $15.8 million for natural gas utilities. CAP enrollments totaled 311,000 electric customers and 181,986 natural gas customers, resulting in CAP expenditures of $250.1 million for electric programs and $151.7 million for natural gas programs. This Report is available at: http://www.puc.pa.gov/General/publications_reports/pdf/EDC_NGDC_UniServ_Rpt2011.pdf These program costs are assigned only to residential ratepayers in Pennsylvania, contrary to the typical policy in other states that all customer classes should support these programs in regulated rates.

[50] Public Act 90-0561.

[51] Commonwealth Edison, Illinois' largest electric utility that serves the northern and Chicago area of Illinois, is owned by Exelon, a corporation that also owns extensive generation resources throughout the PJM wholesale market area, of which northern Illinois is a part. Exelon also owns other distribution utilities, including PECO Energy in Pennsylvania and Baltimore Gas & Electric in Maryland.

[52] Public Act 095-0481.

[53] See, http://www.pluginillinois.org/MunicipalAggregationList.aspx

[54] http://www.icc.illinois.gov/downloads/public/en/2012%20Annual%20Report.pdf

[55] The Illinois Commission publishes retail electric migration statistics at http://www.icc.illinois.gov/electricity/switchingstatistics.aspx

[56] Public Act 096-0033.

[57] See, e.g., the PIPP brochure issued by Community and Economic Development Association of Cook County, Inc., available at www.cedaorg.net. This agency is responsible for providing LIHEAP, WAP, and PIPP enrollment in Cook County (Chicago).

[58] Under the Illinois PIPP program, the maximum benefit for an electric customer (non-heating) is $50, but a lesser amount would be applicable depending on the comparison of the household income and annual electric usage.

[59] Of course, the customer may be liable for an early termination fee if the contract is cancelled prior to its end date.

[60] Illinois Commerce Commission, Docket 08-0175.

[61] Senate Bill 0171, effective 2010, amending the Public Utilities Act, 220 ILCS 5 (natural gas suppliers); Public Act 095-0130, (electric suppliers).

[62] See the DPU's Order in D.T.E. 02-40-B.

[63] See, http://www.mass.gov/eea/grants-and-tech-assistance/guidance-technical-assistance/agencies-and-divisions/doer/electric-customer-migration-data.html.

[64] See, the Orders issued in Docket D.T.E. 98-32-B, -D, and -E and the resulting regulations at 220 CMR 14.00.

[65] The natural gas utilities provide migration reports to the Department under Docket D.P.U. 12-CMI-01. The most recent information was filed in June 2012. The migration rate for larger commercial and industrial customers is much higher, over 50% for some customer classes.

[66] The Department's electric restructuring regulations require distribution utilities to file a tariff that provides a Low Income Discount that will ensure that the discount in effect for the total bill prior to restructuring will provide the same level of discount that will now be applied to the distribution portion of the bill. 220 CMR 11.04. The comparable natural gas restructuring regulations adopt the same approach. 220 CMR 14.03.

[67] The DPU has initiated a proceeding to consider potential changes to unify the design and implementation of the low income discount programs as implemented by the various gas and electric utilities in Docket No. DPU 13-73.

[68] 940 CMR 19.00.

[69] Docket No. D.P.U. 12-76.

[70] See, Case 06-M-1017, Policies, Practices and Procedures for Utility Commodity Supply Service to Residential and Small Commercial and Industrial Customers - Instituting A Phase II to Address Longer-Term Issues, Order Requiring Development Of Utility-Specific Guidelines For Electric Commodity Supply Portfolios And Instituting A Phase II To Address Longer-Term Issues (April 19, 2007), available at the Commission's website under this case number: www.dps.state.ny.us

[71] See, http://www3.dps.ny.gov/W/PSCWeb.nsf/All/4759ECEE7586F24B85257687006F396E?OpenDocument.
[72] The Commission's website lists "savings" as the first aspect of retail competition in its explanation to customers of this program. See, http://www.dps.ny.gov/energychoices.htm
[73] www.centralhudson.com/energy_choice/energy_switch.html
[74] www.newyorkpowertochoose.com Unfortunately, the default service prices listed on this website are not necessarily available to customers.
[75] Consolidated Edison's current low income programs were approved in Case 09-E-0428 and 09-G-0795 (multi year rate plans). The reported data is from its June 30, 2012 Low Income Report.
[76] See Consolidated Edison tariffs, Service Classification No. 2 and No. 3 (October 1, 2011).
[77] Case 11-E-0408.
[78] Cases 09-E-0715, 09-G-0716, 09-E-0717 and 09-G-0718. The Commission issued its order approving the rate plan and expanded low income programs on September 21, 2010. See pp. 61-62.
[79] New York Public Service Commission, Proceeding on Motion of the Commission to Assess Certain Aspects of the Residential and Small Non-residential Retail Energy Markets (Case 12-M-0476), In the Matter of Retail Access Business Rules (Case 98-M-1343), and In the Matter of Energy Service Company Price Reporting Requirements (Case 06-M-0647).
[80] Available in the Case file for this proceeding at http://documents.dps.ny.gov/public/MatterManagement/CaseMaster.aspx?MatterSeq=41126